LIMITING THE INSANITY DEFENSE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669

JUNE 24, 30, AND JULY 14, 1982

Serial No. J-97-122

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
14-134 O
WASHINGTON : 1983

S521-40

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

Vinton DeVane Lide, *Chief Counsel and Staff Director*
Mark H. Gitenstein, *Minority Chief Counsel*

Subcommittee on Criminal Law

CHARLES McC. MATHIAS, Jr., Maryland, *Chairman*

PAUL LAXALT, Nevada
ARLEN SPECTER, Pennsylvania
ROBERT DOLE, Kansas

JOSEPH R. BIDEN, Jr., Delaware
HOWARD M. METZENBAUM, Ohio
HOWELL HEFLIN, Alabama

Michael R. Klipper, *Chief Counsel*
Ralph Oman, *Staff Director*

CONTENTS

OPENING STATEMENTS

Page

Biden, Hon. Joseph R., Jr., a U.S. Senator from the State of Delaware 171
Dole, Hon. Robert, a U.S. Senator from the State of Kansas 84
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah 34
Heflin, Hon. Howell, a U.S. Senator from the State of Alabama 82, 233
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania 1, 221, 279

PROPOSED LEGISLATION

S. 818—A bill to amend title 18 to limit insanity defense 37
S. 1106—A bill to reform the insanity defense 62
S. 1558—A bill to amend title 18 to limit the insanity defense and to establish a verdict of not guilty only by reason of insanity 39
S. 1995—A bill to remedy procedural and structural defects in the criminal justice system 85
S. 2572—A bill to strengthen law enforcement in the areas of violent crime and drug trafficking, and for other purposes 3
S. 2658—A bill to amend title 18 to delimit the insanity defense, and for other purposes 32
S. 2669—A bill to amend title 18 to limit the defense of insanity 53

CHRONOLOGICAL LIST OF WITNESSES

THURSDAY, JUNE 24, 1982

Pressler, Hon. Larry, a U.S. Senator from the State of South Dakota 51
Zorinsky, Hon. Edward, a U.S. Senator from the State of Nebraska 60
Panel of jurors from the John Hinckley trial consisting of: Lawrence Coffey; Nathalia Brown; Woodrow Johnson; Glynis Lassiter; and Maryland Copelin. 155
Ratner, Richard A., M.D., Washington, D.C. 202
Beigel, Allan, chairman, Governmental Relations Committee, American Psychiatric Association 208

WEDNESDAY, JUNE 30, 1982

Cavanaugh, James L., Jr., clinical director, section on psychiatry and the law, department of psychiatry, Rush-Presbyterian-St. Luke's Medical Center 222
Rappeport, Jonas R., chief medical officer, Supreme Bench of Maryland 227
Prelinger, Ernest, clinical professor of psychology in psychiatry, Yale University 232
Beigel, Allan, chairman, Government Relations Committee, American Psychiatric Association 250
Stone, Alan, professor of law and psychiatry, Harvard University Law School. 252
Roth, Loren, director of law and psychiatry, Western Psychiatric Institute and Clinic 256
Halleck, Seymour, professor of psychiatry, University of North Carolina 269

WEDNESDAY, JULY 14, 1982

Tjoflat, Hon. Gerald Bard, U.S. Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit, chairman of the Committee on the Administration of the Probation System Judicial Conference of the United States 280
Kamenar, Paul D., director of litigation, Washington Legal Foundation 290

Page

Kleier, Maxene, consultant to Florida Community Mental Health director, member of the Governor's Commission on Advocacy for the Developmentally Disabled 303

Symms, Hon. Steven D., a U.S. Senator from the State of Idaho 306

Leroy, Hon. David H., attorney general for the State of Idaho 308

Ellis, James W., professor of law, University of New Mexico, reporter, ABA Task Force on Civil Commitment of Prosecuted Persons 321

Weiner, Barbara A., adjunct professor of law, Illinois Institute of Technology, Chicago-Kent; faculty, Rush Medical College; administrative counsel ISAAC Ray Center, department of psychiatry, Rush president, St. Luke's Presbyterian Hospital, Chicago, Illinois 323

Steadman, Dr. Henry J., bureau of special projects research, New York State Department of Mental Hygiene 364

Silver, Dr. Stuart B., superintendent, Perkins Hospital, assistant secretary for Forensic Services, State of Maryland 374

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Beigel, Allan:
- Testimony 208, 250
- Article from American Psychiatric Association 216

Biden, Hon. Joseph R., Jr.:
- Prepared statement 171
- Criminal Code Reform Act of 1981, report No. 97-307 174
- Legal Insanity: Gone Bonkers, by Willard Gaulin, Washington Post, June 20, 1982 183
- How Psychiatry Can Aid Courts, by Garland Y. DeNelsky, from the New York Times, June 21, 1982 186

Brown Nathalia: Testimony 155

Cavanaugh, James L., Jr.: Testimony 222

Coffey, Lawrence: Testimony 155

Copelin, Maryland: Testimony 155

Dole, Hon. Robert:
- Opening statement 84
- Text of S. 1995 85

Ellis, James W.:
- Testimony 321
- Supplemental statement 387

Halleck, Seymour:
- Testimony 269
- Prepared statement 272

Hatch, Hon. Orrin G.:
- Prepared statement 34
- Text of S. 818 37
- Text of S. 1558 39

Leroy, Hon. David H.: Testimony 308

Johnson, Woodrow: Testimony 155

Kamenar, Paul D.:
- Testimony 290
- Prepared statement 297

Kleier, Maxene: Testimony 303

Lassiter, Glynis: Testimony 155

Prelinger, Ernest: Testimony 232

Pressler, Hon. Larry:
- Testimony 51
- Text of S. 2669 53

Rappeport, Jonas R.: Testimony 227

Ratner, Richard A.: Testimony 202

Roth, Loren:
- Testimony 256
- Letter to Senator Specter 264

Silver, Stuart B.:
- Testimony 374
- Prepared statement 378

Specter, Hon. Arlen:
- Opening statements 1, 221, 279
- Text of S. 2572 3
- Text of S. 2658 32

Specter, Hon. Arlen—Continued — Page
- Letter to Judge Barrington D. Parker with response 219

Steadman, Henry J.:
- Testimony 364
- Prepared statement 367

Stone, Allen: Testimony 252

Symms, Hon. Steven D.: Testimony 306

Tjoflat, Hon. Gerald Bard: Testimony 280

Weiner, Barbara A.:
- Testimony 323
- Prepared statement 325
- Not Guilty by Reason of Insanity: A Sane Approach from the Chicago-Kent Law Review, vol. 56, 1980, No. 4 331

Zorinsky, Hon. Edward:
- Testimony 60
- Test of S. 1106 62

APPENDIX

Psychological Issues and the Insanity Defense: Legal, Moral and Psychological Considerations, by Stanley I. Gochman, Ph. D. 389

LIMITING THE INSANITY DEFENSE

THURSDAY, JUNE 24, 1982

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 4232, Dirksen Senate Office Building, Hon. Arlen Specter (acting chairman of the subcommittee) presiding.

Present: Senators Biden, Metzenbaum, DeConcini, and Heflin.

Staff present: Mary Louise Westmoreland, counsel; Marc Walpow, staff assistant; Paul Michel, staff assistant; and Bruce A. Cohen, chief counsel, Subcommittee on Juvenile Justice.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good morning, ladies and gentlemen. The Criminal Law Subcommittee of the Committee on the Judiciary will come to order.

This matter has been discussed with Senator Thurmond, the chairman of the Committee on the Judiciary and Senator Mathias, the chairman of the Subcommittee on Criminal Law.

We will be proceeding today to have hearings on a number of bills which are concerned with the insanity defense in criminal cases. They are S. 818, introduced by Senator Hatch; S. 1106, introduced by Senator Zorinsky; S. 1558, introduced by Senator Hatch; S. 1995, introduced by Senator Dole; S. 2572, introduced by Senator Thurmond; S. 2658, which I introduced on Tuesday; and S. 2669, introduced by Senator Pressler.

This hearing has been convened promptly because of the public concern engendered by the acquittal of Mr. Hinckley. The American public has raised the question appropriately as to whether the criminal justice system can deal with violent crime and whether or not the legal technicalities weigh too heavily in favor of defendants. That has been a recurrent issue in the criminal justice system and has been posed in the *Hinckley* trial with respect to the insanity defense.

This hearing has been convened as promptly as possible so that the public will be aware that the law can respond to correct errors where such errors are found in the criminal justice system. It has been convened promptly so that we can have the benefit of the thinking of those who participated in the trial itself. This morning we are going to concentrate and focus on the jurors who rendered the verdict in the *Hinckley* case.

In calling upon the jurors, we are aware of the sensitivity of making an inquiry into the processes in the jury's deliberation. But it is appropriate and lawful to ask a juror a question. The juror, like any other citizen, has the right to respond or not to respond, as the juror sees fit.

We have five of the *Hinckley* jurors here this morning. I have just had a brief conversation with them and have told them that it is our view that it is a public service that they come forward, which they are doing so entirely voluntarily. We do not propose to ask any questions which they do not feel comfortable in answering. But we think it is useful that the central issue be examined in the most realistic context, and that is what did the jury understand on the instructions of the substantive law of insanity, what did the jury understand on the issue of burden of proof, what did the jury understand on the psychiatric testimony which was given, and what were the pressures, if any, which led them to the verdict so that we can better formulate appropriate substantive laws and procedural laws on cases involving the defense of insanity.

We have been in touch with Judge Parker and have sought his testimony as well. It is at this moment an open question whether he will give us the benefit of his thinking. There are obvious sensitivities in issue there, but we are hopeful that at a later date, perhaps next week when we can have further hearings on this matter, that Judge Parker will be available. But that is a decision which he will have to make. It turns in part on his continuing responsibilities on the *Hinckley* matter.

We have been in touch with the Department of Justice. We expect testimony from the Department as to their view of the case itself and what corrective measures, if any, ought to be taken. We have been in touch with the defense lawyers. They have not decided whether or not it would be appropriate for them, in their view, to come forward to testify. But that is a matter which we will address further next week or beyond. We have been in touch with members of the psychiatric profession and the legal profession. We will be hearing from those groups and then from a wide variety of lay citizens as well as to the views which others may have on this important subject.

[The text of S. 2572 and S. 2658 follows:]

S. 2572

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Violent Crime and Drug Enforcement Improvements Act of 1982".

TITLE I—BAIL REFORM

Sec. 101. This title may be cited as the "Bail Reform Act of 1982".

Sec. 102. (a) Sections 3141 through 3151 of title 18, United States Code, are repealed and the following sections are inserted in lieu thereof:

"§ 3141. Release and detention authority generally

"(a) Pending Trial.—A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

"(b) Pending Sentence or Appeal.—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

"§ 3142. Release or detention of a defendant pending trial

"(a) In General.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

"(1) released on his personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of subsection (b);

"(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

"(3) temporarily detained to permit revocation of conditional release pursuant to the provisions of subsection (d); or

"(4) detained pursuant to the provisions of subsection (e).

"(b) Release on Personal Recognizance or Unsecured Appearance Bond.—The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

"(c) Release on Conditions.—If the judicial officer determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

"(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

"(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

"(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

"(B) maintain employment, or, if unemployed, actively seek employment;

"(C) maintain or commence an educational program;

"(D) abide by specified restrictions on his personal associations, place of abode, or travel;

"(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

"(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

"(G) comply with a specified curfew;

"(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(J) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

"(K) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

"(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

"(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

"(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

"(d) Temporary Detention To Permit Revocation Of Conditional Release.—If the judicial officer determines that—

"(1) the person is, and was at the time the offense was committed, on—

"(A) release pending trial for a felony under Federal, State, or local law;

"(B) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

"(C) probation or parole for any offense under Federal, State, or local law; and

"(2) the person may flee or pose a danger to any other person or the community;

he shall order the detention of the person, for a period of not more than ten days, and direct the attorney for the Government to notify the appropriate court, probation, or parole official. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section.

"(e) Detention.—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that—

"(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

"(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

"(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under 18 U.S.C. 924(c).

"(f) Detention Hearing.—The judicial officer, upon motion of the attorney for the government or upon the judge's own motion, shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any other person and the community in a case that involves—

"(1) a crime of violence;

"(2) an offense for which the maximum sentence is life imprisonment or death;

"(3) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a);

"(4) a serious risk that the person will flee;

"(5) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror; or

"(6) any felony committed after the person had been convicted of two or more prior offenses described in paragraphs (1) through (3), or two or more State or local offenses that would have been offenses described in paragraphs (1) through (3) if a circumstance giving rise to Federal jurisdiction had existed.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing.

"(g) Factors To Be Considered.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

"(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

"(2) the weight of the evidence against the person;

"(3) the history and characteristics of the person, including—

"(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

"(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

"(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L), the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

"(h) Contents of Release Order.—In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall—

"(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

"(2) advise the person of—

"(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

"(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

"(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court) and 1510 (relating to obstruction of criminal investigation).

"(i) Contents of Detention Order.—In a detention order issued pursuant to the provisions of subsection (e), the judge shall—

"(1) include written findings of fact and a written statement of the reasons for the detention;

"(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

"(3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and

"(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

"§ 3143. Release or detention of a defendant pending sentence or appeal

"(a) Release or Detention Pending Sentence.—The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142 (b) or (c). If the judicial officer makes such a finding, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

"(b) Release or Detention Pending Appeal by the Defendant.—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

"(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142 (b) or (c); and

"(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

"(c) Release or Detention Pending Appeal by the Government.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

"§ 3144. Release or detention of a material witness

"If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

"§ 3145. Review and appeal of a release or detention order

"(a) Review of a Release Order.—If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

"(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

"(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

"(b) Review of a Detention Order.—If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

"(c) Appeal From a Release or Detention Order.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

"§ 3146. Penalty for failure to appear

"(a) Offense.—A person commits an offense if, after having been released pursuant to this chapter—

"(1) he knowingly fails to appear before a court as required by the conditions of his release; or

"(2) he knowingly fails to surrender for service of sentence pursuant to a court order.

"(b) Grading.—If the person was released—

"(1) in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction, for—

"(A) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, he shall be fined not more than $25,000 or imprisoned for not more than ten years, or both;

"(B) an offense punishable by imprisonment for a term of five or more years, but less than fifteen years, he shall be fined not more than $10,000 or imprisoned for not more than five years, or both;

"(C) any other felony, he shall be fined not more than $5,000 or imprisoned not more than two years, or both; or

"(D) a misdemeanor, he shall be fined not more than $2,000 or imprisoned more than one year, or both; or

"(2) for appearance as a material witness, he shall be fined no more than $1,000 or imprisoned for not more one year, or both.

A term of imprisonment imposed pursuant to this section shall be consecutive to the sentence of imprisonment for any other offense.

"(c) Affirmative Defense.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that the defendant appear or surrendered as soon as such circumstances ceased to exist.

"(d) Declaration of Forfeiture.—If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) or is subject to the release condition set forth in section 3142(c)(2)(K), or (c)(2)(L), the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.

"§ 3147. Penalty for an offense committed while on release

"A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—

"(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

"(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

"§ 3148. Sanctions for violation of a release condition

"(a) Available Sanctions.—A person who has been released pursuant to the provisions of section 3142, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

"(b) Revocation of Release.—The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which his arrest was ordered for a proceeding in accordance with this section. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—

"(1) finds that there is—

"(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

"(B) clear and convincing evidence that the person has violated any other condition of his release; and

"(2) finds that—

"(A) based on the factors set forth in section 3142(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

"(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, he shall treat the person in accordance with the provisions of section 3142 and may amend the conditions of release accordingly.

"(c) Prosecution for Contempt.—The judge may commence a prosecution for contempt, pursuant to the provisions of section 401, if the person has violated a condition of his release.

"§ 3149. Surrender of an offender by a surety

"A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, and if so arrested, shall be delivered promptly to a United States marshal and brought before a judicial officer. The judicial officer shall determine in accordance with the provisions of section 3148(b) whether to revoke the release of the person.

and may absolve the surety of responsibility to pay all or part of the bond in accordance with the provisions of rule 46 of the Federal Rules of Criminal Procedure. The person so committed shall be held in official detention until released pursuant to this chapter or another provision of law.

§ 3150. Applicability to a case removed from a State court

"The provisions of this chapter apply to a criminal case removed to a Federal court from a State court.".

(b) Section 3154 of title 18, United States Code, is amended—

(1) in subsection (1), by stiking out "and recommend appropriate release conditions for each such person" and inserting in lieu thereof "and, where appropriate, include a recommendation as to whether each such person should be released or detained and, if release is recommended, recommend appropriate conditions of release"; and

(2) in subsection (2), by striking our "section 3146(e) or section 3147" and inserting in lieu thereof "section 3145";

(c) Section 3156(a) of title 18, United States Code, is amended—

(1) by striking out "3146" and inserting in lieu thereof "3141";

(2) in paragraph (1)—

(A) by striking out "bail or otherwise" and inserting in lieu thereof "detain or"; and

(B) by deleting "and" at the end thereof;

(3) in paragraph (2), by striking out the period at the end and inserting in lieu thereof "; and";

(4) by adding after paragraph (2) the following new paragraphs:

"(3) The term 'felony' means an offense punishable by a maximum term of imprisonment of more than one year; and

"(4) The term 'crime of violence' means—

"(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physicial force against the person or property of another; or

"(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physicial force against the person or property of another may be used in the course of committing the offense."; and

(5) in subsection (b)(1), by striking out "bail or otherwise" and inserting in lieu thereof "detain or".

(d) The item relating to chapter 207 in the analysis of part *II* of title 18, United States Code, is amended to read as follows:

"207. Release and detention pending judicial proceedings .... 3141".

(e)(1) The caption of chapter 207 is amended to read as follows:

"CHAPTER 207—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS".

(2) The section analysis for chapter 207 is amended by striking out the items relating to section 3141 through 3151 and inserting in lieu thereof the following:

"3141. Release and detention authority generally.
"3142. Release or detention of a defendant pending trial.
"3143. Release or detention of a defendant pending sentence or appeal.
"3144. Release or detention of a material witness.
"3145. Review and appeal of a release or detention order.
"3146. Penalty for failure to appear.
"3147. Penalty for an offense committed while on release.
"3148. Sanctions for violation of a release condition.
"3149. Surrender of an offender by a surety.
"3150. Applicability to a case removed from a State court."

Sec. 103. Chapter 203 of title 18, United States Code, is amended as follows:

(a) The last sentence of section 3041 is amended by striking out "determining to hold the prisoner for trial" and inserting in lieu thereof "determining, pursuant to the provisions of section 3142 of this title, whether to detain or conditionally release the prisoner prior to trial".

(b) The second paragraph of section 3042 is amended by striking out "imprisoned or admitted to bail" and inserting in lieu thereof "detained or conditionally released pursuant to section 3142 of this title".

(c) Section 3043 is repealed.

(d) The following new section is added after section 3061:

"§ 3062. General arrest authority for violation of release conditions

"A law enforcement officer, who is authorized to arrest for an offense committed in his presence, may arrest a person who is released pursuant to chapter 207 if the officer has reasonable grounds to believe that the person is violating, in his presence, a condition imposed on the person pursuant to section 3142(c)(2)(D), (c)(2)(E), (c)(2)(H), (c)(2)(I), or (c)(2)(M), or, if the violation involves a failure to remain in a specified institution as required, a condition imposed pursuant to section 3142(c)(2)(J).".

(e) The section analysis is amended—

(1) by amending the item relating to section 3043 to read as follows:

"3043. Repealed."; and

(2) by adding the following new item after the item relating to section 3061:

"3062. General arrest authority for violation of release conditions.".

Sec. 104. Section 3731 of title 18, United States Code, is amended by adding after the second paragraph the following new paragraph:

"An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.".

Sec. 105. The second paragraph of section 3772 of title 18, United States Code, is amended by striking out "bail" and inserting in lieu thereof "release pending appeal".

Sec. 106. Section 4282 of title 18, United States Code, is amended—

(a) by striking out "and not admitted to bail" and substituting "and detained pursuant to chapter 207"; and

(b) by striking out "and unable to make bail".

Sec. 107. Section 636 of title 28, United States Code, is amended by striking out "impose conditions of release under section 3146 of title 18" and inserting in lieu thereof "issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial".

Sec. 108. The Federal Rules of Criminal Procedure are amended as follows:

(a) Rule 5(c) is amended by striking out "shall admit the defendant to bail" and inserting in lieu thereof "shall detain or conditionally release the defendant".

(b) The second sentence of rule 15(a) is amended by striking out "committed for failure to give bail to appear to testify at a trial or hearing" and inserting in lieu thereof "detained pursuant to 18 U.S.C. § 3144".

(c) Rule 40(f) is amended to read as follows:

"(f) Release or Detention. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information or indictment issued, the Federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the Federal magistrate amends the release or detention decision or alters the conditions of release, he shall set forth the reasons for his action in writing.".

(d) Rule 46 is amended—

(1) in subdivision (a), by striking out "3146, 3148, or 3149" and inserting in lieu thereof "3142 and 3144";

(2) in subdivision (c), by striking out "3148" and inserting in lieu thereof "3143";

(3) by amending subdivision (e)(2) to read as follows:

"(2) Setting Aside.—The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture."; and

(4) by adding the following new subdivision at the end thereof:

"(h) Forfeiture of Property.—Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. § 3142(c)(2)(K) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.".

(e) Rule 34(b)(3) is amended by striking out "18 U.S.C. § 3043, and".

Sec. 109. Rule 9(c) of the Federal Rules of Appellate Procedure is amended by striking out "3148" and inserting in lieu thereof "3143", and following the word "community", inserting "and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial".

TITLE II—WITNESS-VICTIM PROTECTION

Sec. 201. This title may be cited as the "Witness-Victim Protection Act of 1982".

PART A—VICTIM IMPACT STATEMENT

Sec. 202. Rule 32(c)(2) of the Federal Rules of Criminal Procedure, as amended by section 505 of title V of this Act, is amended by adding at the end thereof the following new sentence: "The report shall also contain verified information, stated in a nonargumentative style, assessing the financial, social, psychological, and medical impact upon any person who was the victim of the offense committed by the defendant.".

PART B—PROTECTION OF VICTIMS AND WITNESSES FROM INTIMIDATION

Sec. 203. (a) Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1512. Tampering with a witness, victim, or an informant

"(a) Offense.—Whoever—

"(1) uses force, threat, intimidation, or deception with intent to—

"(A) influence the testimony of another person in an official proceeding; or

"(B) cause or induce another person to—

"(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

"(ii) evade legal process summoning him to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or "(iii) absent himself from an official proceeding to which he has been summoned by legal process; or

"(C) hinder, delay, or prevent the communication to a law enforcement officer of information relating to an offense or a possible offense;

"(2) with intent to annoy, harm, or injure another person, hinders, delays, prevents, or dissuades—

"(A) a witness or a victim from attending or testifying in an official proceeding; or

"(B) a witness, victim, or a person acting on behalf of a victim, from—

"(i) making a report of an offense or a possible offense to a judge, a law enforcement officer, or probation officer, or an officer of a correctional facility;

"(ii) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted or assisting in such prosecution or proceeding; or

"(iii) arresting, or causing or seeking the arrest of, a person in connection with an offense; or

"(3) does any other act with intent to influence improperly, or to obstruct or impair, the—

"(A) administration of justice;

"(B) administration of a law under which an official proceeding is being or may be conducted; or

"(C) exercise of a legislative power of inquiry;

shall be punished as provided in subsection (b).

"(b) Punishment.—Whoever is guilty of an offense set forth in subsection (a)(1) shall be fined not more than $25,000, or imprisoned not more than six years, or both. Whoever is guilty of an offense set forth in subsection (a)(2) or (a)(3) shall be fined not more than $5,000 or imprisoned not more than one year, or both.

"(c) Definitions.—As used in this section and section 1513—

"(1) 'official proceeding' means a proceeding or inquiry, including an investigative proceeding or inquiry convened or instituted pursuant to lawful authority, or a portion of such a proceeding or inquiry, that is or may be heard or conducted by—

"(A) a federal government branch or agency; or

"(B) a federal public servant who is authorised to take oaths, including a judge or magistrate, a chairman or a member of Congress authorised by a legislative committee or subcommittee, a bankruptcy judge, an administrative law judge, a hearing examiner, and a notary;

"(2) 'victim' means an individual against whom an offense has been or is being committed; and

"(3) 'witness' means an individual—

"(A) having knowledge of the existence or nonexistence of facts relating to an offense;

"(B) whose declaration under oath is received in evidence for any purpose;

"(C) who has reported an offense to a judge, a law enforcement officer, or probation officer, or an officer of a correctional facility;

"(D) who has been served with a subpena, including a grand jury subpena, issued under the authority of a court of the United States; or

"(E) who a reasonable person would believe to be an individual described in this paragraph;

"(d) Affirmative Defense.—It is an affirmative defense to a prosecution under subsection (a)(1)(A) that the conduct engaged in to threaten or to intimidate consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the other person to testify truthfully. If the defendant raises such affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

"(e) Defenses Precluded.—It is not a defense to a prosecution under this section that—

"(1) an official proceeding was not pending or about to be instituted; or

"(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

"(f) Jurisdiction.—There is federal jurisdiction over an offense described in this section if—

"(1) the official proceeding, offense, or prosecution is or would be a Federal official proceeding, offense, or prosecution;

"(2) the officer is a Federal public servant and the information or report relates to a Federal offense or a possible Federal offense;

"(3) the administration of justice, administration of a law, or exercise of a legislative power of inquiry relates to a Federal Government function or;

"(4) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1513. Retaliating against a witness or an informant

"(a) Offense.—Whoever—

"(1) engages in conduct by which he causes bodily injury to another person or damages the property of another person because of—

"(A) the attendance of a witness or party at an official proceeding, or any testimony given, or any record, document, or other object produced, by a witness in an official proceeding; or

"(B) any information relating to an offense or a possible offense given by a person to a law enforcement officer; or

"(2) unlawfully subjects a Federal public servant to economic loss or injury to his business or profession because of any matter described in subparagraph (A) or (B) of paragraph (1);

shall be punished as provided in subsection (b).

"(b) Punishment.—Whoever is guilty of an offense set forth in subsection (a)(1) shall be fined not more than $10,000 or imprisoned not more than three years, or both. Whoever is guilty of an offense in any other case under this section shall be fined not more than $5,000 or imprisoned for not more than one year, or both.

"(c) Jurisdiction.—There is Federal jurisdiction over an offense described in this section if—

"(1) the official proceeding is a Federal official proceeding;

"(2) the law enforcement officer is a Federal public servant and the information relates to a Federal offense or a possible Federal offense;

"(3) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(4) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.".

(b) The analysis for chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"1512. Tampering with a witness, victim, or an informant.
"1513. Retaliating against a witness or an informant.".

Sec. 204. (a) Title 18 of the United States Code is amended by adding after chapter 223 the following new chapter:

"CHAPTER 224—PROTECTION OF WITNESSES

"Sec.
"3521. Witness relocation and protection.
"3522. Reimbursement of expenses.
"3523. Civil action to restrain witness or victim intimidation.
"3524. Definition for chapter.

"§ 3521. Witness relocation and protection

"(a) Relocation.—The Attorney General may provide for the relocation or protection of a government witness or a potential government witness in an official proceeding if the Attorney General determines that an offense described in section 1512 or 1513, or a State or local offense that is similar in nature or that involves a crime of violence directed at a witness, is likely to be committed. The Attorney General may also provide for the relocation or protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered.

"(b) Related Protective Measures.—In connection with the relocation or protection of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General may take any action he determines to be necessary to protect such person from bodily injury, and otherwise to assure his health, safety, and welfare, for as long as, in the judgment of the Attorney General, such danger exists. The Attorney General may—

"(1) provide suitable official documents to enable a person relocated to establish a new identity;

"(2) provide housing for the person relocated or protected;

"(3) provide for the transportation of household furniture and other personal property to the new residence of the person relocated;

"(4) provide a tax free subsistence payment, in a sum established in regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

"(5) assist the person relocated in obtaining employment; and

"(6) refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure.

"(c) Civil Action Against a Relocated Person.—Notwithstanding the provisions of subsection (b)(6), if a person relocated under this section is named as a defendant in a civil cause of action, arising prior to the person's relocation, for damages resulting from bodily injury, property damage, or injury to business, process in the civil proceeding may be served upon the Attorney General. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person relocated at his last known address. If a judgment in such an action is entered against the person relocated, the Attorney General shall determine whether the person has made reasonable efforts to comply with the provisions of that judgment. The Attorney General shall take affirmative steps to urge the person relocated to comply with any judgment rendered. If the Attorney General determines that the person has not made reasonable efforts to comply with the provisions of the judgment, he may, in his discretion, after weighing the danger to the person relocated, disclose the identity and location of that person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery. Any such disclosure or nondisclosure by the Attorney General shall not subject the government to liability in any action based upon the consequences thereof.

"§ 3522. Reimbursement of expenses

"The provision of transportation, housing, subsistence, or other assistance to a person under section 3521 may be conditioned by the Attorney General upon reimbursement of expenses in whole or in part to the United States by a State or local government.

"§ 3523. Civil action to restrain witness or victim intimidation

"(a) Initiation of Action.—The Attorney General may initiate a civil proceeding to prevent and restrain an offense involving a witness or a victim under section 1512. Upon a finding, which may be based upon hearsay or the representation of the attorney for the government or the counsel for the defendant, that an offense under section 1512 involving a witness or a victim has occurred or is reasonably likely to occur, the court may order that a defendant, a witness, or other person connected with the case, or an individual in the courtroom—

"(1) refrain from engaging in conduct in violation of section 1512;

"(2) maintain a prescribed distance from a specified victim or witness; and

"(3) refrain from communicating with a specified victim or witness except under such conditions as the court may impose.

"(b) Jurisdiction.—A district court of the United States in which a proceeding is initiated under this section has jurisdiction to hear and determine the matter so presented, and to prevent and restrain an offense referred to in subsection (a). In a proceeding initiated under this section, the court shall proceed as soon as practicable to a hearing and determination.

"§ 3524. Definition for chapter

"As used in this subchapter 'government' includes the federal government and a State or local government.".

(b) The table of chapters for part II of title 18, United States Code, is amended by adding after the item for chapter 223 the following new item:

"224. Protection of witnesses.............. 3521".

(c) Title V of the Organized Crime Control Act of 1970 (84 Stat. 933) is repealed.

Part C—Federal Accountability for Escape or Release of a Federal Prisoner

Sec. 205. Section 1346(b) of title 28 of the United States Code is amended by inserting "(1)" immediately after "(b)" and by adding at the end thereof the following:

"(2)(A) Subject to the provisions of chapter 171 of this title and subparagraph (B) of this paragraph, the district courts together with the United States District Court of the Virgin Islands, shall have exclusive jurisdiction of any civil action on a claim against the United States for damages, accruing on and after the date of enactment of this paragraph, for injury or loss of property, or personal injury or death directly caused by any dangerous offender charged with or convicted of a Federal offense who is released from, or who escapes from, lawful custody of an employee of, or any person acting as the lawful agent of, the United States as a result of the gross negligence of such employee or person.

"(B) For the purposes of this paragraph—

"(i) 'gross negligence' includes the failure to warn reasonably foreseeable victims that the person charged with or convicted of the offense was released or has escaped, or the violation of a statute, regulation, or court order which results in such release or escape; and

"(ii) 'dangerous offender' means a person charged with or convicted of a crime involving the use, attempted use, or threatened use of violence against the person or property of another.".

Part D—Attorney General Report

Sec. 206. Within six months after the date of enactment of this title, the Attorney General shall report to the Congress concerning any laws necessary to ensure that all victims of crime are justly compensated in those cases in which restitution is not possible. The Attorney General shall consider funding methods such as imposing additional fines on all individuals convicted of Federal crimes.

TITLE III—CONTROLLED SUBSTANCES PENALTIES

Sec. 301. This title may be cited as the "Controlled Substances Penalties Amendments Act of 1982".

Sec. 302. Subsection (b) of section 401 of the Controlled Substances Act (21 U.S.C. 841(b)) is amended—

(1) in paragraph (1), by—

(A) redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively, and inserting after "(1)" a new subparagraph to read as follows:

"(A) In the case of a violation of subsection (a) of this section involving—

"(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of narcotic drug other than a narcotic drug consisting of—

"(a) coca leaves;

"(b) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

"(c) a substance chemically identical thereto;

"(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

"(iii) 500 grams or more of phencyclidine (PCP); or

"(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both";

(B) in subparagraph (B), as redesignated above, by—

(i) striking out "which is a narcotic drug" in the first sentence and inserting in lieu thereof "except as provided in subparagraphs (A) and (C),"

(ii) striking out "$25,000" and "$50,000" and inserting in lieu thereof "$125,000" and "$250,000", respectively; and

(iii) striking out "of the United States" in the second sentence and inserting in lieu thereof "of a State, the United States, or a foreign country"; and

(C) in subparagraph (C), as redesignated above, by—

(i) striking out "a controlled substance in schedule I or II which is not a narcotic drug" and ", (5), and (6)" and inserting in lieu thereof "less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil" and "and (5)", respectively;

(ii) striking out "$15,000" and "$30,000" and inserting in lieu thereof "$50,000" and "$100,000", respectively; and

(iii) striking out "of the United States" in the second sentence and inserting in lieu thereof "of a state, the United States, or a foreign country";

(2) in paragraph (2), by—

(A) striking out "$10,000" and "$20,000" and inserting in lieu thereof "$25,000" and "$50,000", respectively; and

(B) striking out "of the United States" and inserting in lieu thereof "of a state, the United States, or a foreign country";

(3) in paragraph (3), by—

(A) striking out "$5,000" and "$10,000" and inserting in lieu thereof "$10,000" and "$20,000", respectively; and

(B) striking out "of the United States" and inserting in lieu thereof "of a state, the United States, or a foreign country";

(4) in paragraph (4), by striking out "(1)(B)" and inserting in lieu thereof "(1)(C)";

(5) by striking out paragraphs (5) and (6).

Sec. 303. Subsection (b) of section 1010 of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively, and inserting after "(b)" a new paragraph to read as follows:

"(1) In the case of a violation under subsection (a) of this section involving—

"(A) 100 grams or more of a mixture or substance containing a detectable amount of a narcotic drug in schedule I or II other than a narcotic drug consisting of—

"(i) cocoa leaves;

"(ii) a compound, manufacture, salt, derivative, or preparation of cocoa leaves; or

"(iii) a substance chemically identical thereto;

"(B) a kilogram or more of any other narcotic drug in schedule I or II;

"(C) 500 grams or more of phencyclidine (PCP);

"(D) 5 grams or more of lysergic acid diethylamide (LSD); the person committing such violation shall be imprisoned for not more than twenty years, or fined not more than $250,000, or both.";

(2) in paragraph (2), as redesignated above, by—

(A) striking out "narcotic drug in schedule I or II, the person committing such violation shall" and inserting in lieu thereof "controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1) and (3),"; and

(B) striking out "$25,000" and inserting in lieu thereof "$125,000";

(3) in paragraph (3), as redesignated above, by—

(A) striking out "a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall" and inserting in lieu thereof "less than 50 kilograms of marihuana, less than 10 kilograms of hashish, less than one kilogram of hashish oil, or any quantity of a controlled substance in schedule III, IV, or V, the person committing such violation shall, except as provided in paragraph (4)"; and

(B) striking out "$15,000" and substituting "$50,000".

Sec. 304. Section 1012 of the Controlled Substances Import and Export Act (21 U.S.C. 962) is amended by striking out "the United States" in subsection (b) and inserting in lieu thereof "a State, the United States, or a foreign country".

TITLE IV—PROTECTION OF FEDERAL OFFICIALS

Sec. 401. (a) Subsection (a) of section 351 of title 18 of the United States Code is amended to read as follows:

"(a) Whoever kills any individual who is a Member of Congress or a Member-of-Congrss-elect, a member of the executive branch of the government who is the head of a department listed in section 101 of title 5 or the second ranking official in such department, the Director or Deputy Director of Central Intelligence, or a Justice of the United States, as defined in section 451 of title 28, or a person nominated to be a Justice of the United States, during the pendency of such nomination, shall be punished as provided by sections 1111 and 1112 of this title.".

(b) The section heading for section 351 of title 18, United States Code, is amended to read as follows:

"§ 351. Congressional, Cabinet, and Supreme Court assassination, kidnaping, and assault; penalties".

(c) In the table of sections of chapter 18 of title 18, United States Code, amend the item relating to section 351 to read as follows:

"351. Congressional, Cabinet, and Supreme Court assassination, kidnaping, and assault; penalties.".

(d) The chapter analysis of chapter 18 of title 18, United States Code, is amended to read as follows:

"CHAPTER 18—CONGRESSIONAL, CABINET, AND SUPREME COURT ASSASSINATION, KIDNAPING, AND ASSAULT".

(e) The table of contents to "Part I—Crimes" of title 18, United States Code, is amended by striking out the chapter reference to chapter 18 and inserting in lieu thereof the following:

"18. Congressional, Cabinet, and Supreme Court assassination, kidnaping, and assault .... 351".

(f) Subsection (1)(c) of section 2516 of title 18, United States Code, is amended by striking out the parenthetical phrase following "or section 351" and inserting in lieu thereof the following: "(violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, and assault)".

Sec. 402. (a) Subsection (a) of section 1751 of title 18, United States Code, is amended to read as follows:

"(a) Whoever kills (1) any individual who is the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the Office of the President of the United States, the Vice President-elect, or any person who is acting as President under the Constitution and laws of the United States, or (2) any person employed in the Executive Office of the President or in the Office of the Vice President authorized to receive an annual rate of pay equal to that which applies for positions at level II of the Executive Schedule, shall be punished as provided by sections 1111 and 1112 of this title.".

(b) Subsection (e) of section 1751 of title 18, United States Code, is amended to read as follows:

"(e) Whoever assaults any person designated in subsection (a)(1) shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Whoever assaults any person designated in subsection (a)(2) shall be fined not more than $5,000, or imprisoned not more than one year, or both; and if personal injury results, shall be fined not more than $10,000, or imprisoned not more than ten years, or both.".

(c) Subsection (g) of section 1751 of title 18, United States Code, is amended by deleting "this section" and inserting in lieu thereof "subsection (a)(1)".

(d) The section heading for section 1751 of title 18, United States Code, is amended to read as follows:

"§ 1751. Presidential and Presidential staff assassination, kidnaping, and assault; penalties".

(e) In the table of sections of chapter 84 of title 18, United States Code, the item relating to section 1751 is amended to read as follows:

"1751. Presidential and Presidential staff assassination, kidnaping, and assault; penalties.".

(f) The caption of chapter 84 of title 18, United States Code, is amended to read as follows:

"CHAPTER 84—PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATION, KIDNAPING, AND ASSAULT".

(g) The table of contents to "Part I—Crimes" of title 18, United States Code, is amended by striking out the item relating to chapter 84 and inserting in lieu thereof the following:

"84. Presidential and Presidential staff assassination, kidnaping, and assault .... 1751".

(h) Subsection (1)(c) of section 2516 of title 18, United States Code, is amended by striking out the parenthetical phrase following "section 1751" and inserting in lieu thereof "(Presidential and Presidential staff assassination, kidnaping, and assault; penalties)".

TITLE V—SENTENCING REFORM

Sec. 501. This title may be cited as the "Sentencing Reform Act of 1982.

Sec. 502. (a) Title 18 of the United States Code is amended by—

(1) redesignating sections 3577, 3578, 3611, 3612, 3615, 3617, 3618, 3619, 3620, and 3656 as sections 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, and 3670 of a new chapter 232 of title 18 of the United States Code, respectively;

(2) repealing chapters 227, 229, and 231 and substituting the following new chapters:

"CHAPTER 227—SENTENCES

"Subchapter
"A. General Provisions 3551
"B. Probation 3561
"C. Fines 3571
"D. Imprisonment 3581

"Subchapter A—General Provisions

"Sec.
"3551. Authorized Sentences.
"3552. Presentence Reports.
"3553. Imposition of a Sentence.
"3554. Order of Criminal Forfeiture.
"3555. Order of Notice to Victims.
"3556 Order of Restitution.
"3557. Review of a Sentence.
"3558. Implementation of a Sentence.
"3559. Sentencing Classification of Offense.

"§ 3551. Authorized Sentences

"(a) In General.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

"(b) Individuals.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

"(1) a term of probation as authorized by subchapter B;

"(2) a fine as authorized by subchapter C; or

"(3) a term of imprisonment is authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

"(c) Organizations.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

"(1) a term of probation as authorized by subchapter B; or

"(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

§ 3552. Presentence Reports

"(a) Presentence Investigation and Report by Probation Officer.—A United States probation officer shall, pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, make a presentence investigation of a defendant, and shall, before the imposition of sentence, report the results of the investigation to the court.

"(b) Presentence Study and Report by Bureau of Prisons.If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a felony, it may order that the defendant, for the purpose of a study, be committed to the custody of the Bureau of Prisons for a period of not more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The Bureau shall conduct a complete study of the defendant during such period, inquiring into such matters as are specified by the court and any other matters that it believes are pertinent to the factors set forth in section 3553(a). The period of commitment may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of commitment, or by the expiration of any extension granted by the court, the Bureau shall return the defendant to the court for final sentencing, shall provide the court with a written report of the pertinent results of the study, and shall make to the court whatever recommendations the Bureau believes will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that it believes are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

"(c) Presentence Examination and Report by Psychiatric or Psychological Examiners.—If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order that the defendant undergo a phychiatric or psychological examination and that the court be provided with a written report of the results of the examination pursuant to the provisions of section 4247.

"(d) Disclosure of Presentence Reports.—The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the government in a timely manner, pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure.

"§ 3553. Imposition of a Sentence

"(a) Factors To Be Considered in Imposing a Sentence.—The court, in determining the particular sentence to be imposed, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed—

"(A) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

"(3) the kinds of sentences available;

"(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; and

"(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

"(b) Application of Guidelines in Imposing a Sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

"(c) Statement of Reasons for Imposing a Sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

"(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

"(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the sentence does not include an order of restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

"(d) Presentence Procedure for an Order of Notice or Restitution.—Prior to imposing an order of notice pursuant to section 3555, or an order of restitution pursuant to section 3556, the court shall give notice to the defendant and the government that it is considering imposing such an order. Upon motion of the defendant or the government, or on its own motion, the court shall—

"(1) permit the defendant and the government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

"(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

"(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

"§ 3554. Order of Criminal Forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

"§ 3555. Order of Notice to Victims

"The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

"§ 3556. Order of Restitution

"(a) Order.—The court, in imposing a sentence on a defendant who has been found guilty of an offense described in this title, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant—

"(1) in the case of an offense causing bodily injury or death, make restitution to the victim of the offense, or the estate of the victim, in an amount that does not exceed the expenses necessarily incurred by the victim for medical services and, if applicable, the expenses for the funeral and burial of the victim; or

"(2) in the case of an offense in the course of which the defendant unlawfully obtained, damaged, or destroyed the property of another—

"(A) restore the property to the victim of the offense; or

"(B) make restitution to the victim of the offense in an amount that does not exceed the value of the property; and

"(3) make such other restitution as the court finds appropriate. The court shall limit the order of restitution to the amount of expenses or value that the court determines can be ascertained, or to the property that the court determines can be identified, without unduly complicating or prolonging the sentencing process. The provisions of sections 3572, 3573, 3612, and 3613 apply to an order to make restitution.

"(b) Relationship to Civil Proceedings.—The court shall not order restitution as to any victim who is bound by a judgment entered in, or a settlement of, a civil proceeding involving the same injury, obtaining, damage, or destruction. Any amount paid to a person pursuant to an order of restitution shall be set off against an amount otherwise recoverable by such person in any civil proceeding. The fact that restitution was ordered or paid shall not be admissible in evidence in the trial of any civil proceeding.

"§ 3557. *Review of a Sentence*

"The review of a sentence imposed pursuant to section 3551 is governed by the provisions of sections 3742.

"§ 3558. Implementation of a Sentence

"The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

"§ 3559. Sentencing Classification of Offenses

"(a) Classification.—An offense that is not specifically classified by a letter grade in the section defining it, is classified—

"(1) if the maximum term of imprisonment authorized is—

"(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

"(B) twenty years or more, as a Class B felony;

"(C) less than twenty years but ten or more years, as a Class C felony;

"(D) less than ten years but five or more years, as a Class D felony;

"(E) less than five years but more than one year, as a Class E felony;

"(F) one year or less but more than six months, as a Class A misdemeanor;

"(G) six months or less but more than thirty days, as a Class B misdemeanor;

"(H) thirty days or less but more than five days, as a Class C misdemeanor; or

"(I) five days or less, or if no imprisonment is authorized, as an infraction.

"(b) Effect of Classification.—An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this title, whichever is the greater.

"Subchapter B—Probation

"Sec.
"3561. Sentence of Probation.
"3562. Imposition of a Sentence of Probation.
"3563. Conditions of Probation.
"3564. Running of a Term of Probation.
"3565. Revocation of Probation.
"3566. Implementation of a Sentence of Probation.

"§ 3561. Sentence of Probation

"(a) In General.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

"(1) the offense is a Class A felony;

"(2) the offense is an offense for which probation has been expressly precluded; or

"(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

"(b) Authorized Terms.—The authorized terms of probation are—

"(1) for a felony, not less than one nor more than five years;

"(2) for a misdemeanor, not more than two years; and

"(3) for an infraction, not more than one year.

"§ 3562. Imposition of a Sentence of Probation

"(a) Factors To Be Considered in Imposing a Term of Probation.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

"(b) Effect of Finality of Judgment.—Notwithstanding the fact that a sentence of probation can subsequently be—

"(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

"(2) corrected pursuant to the provisions of rule 35 and section 3742; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"§ 3563. Conditions of Probation

"(a) Mandatory Conditions.—The court shall provide, as an explicit condition of a sentence of probation—

"(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another federal, State, or local crime during the term of probation; and

"(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

"(b) Discretionary Conditions.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553 (a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

"(1) support his dependents and meet other family responsibilities;

"(2) pay a fine imposed pursuant to the provisions of subchapter C;

"(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

"(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

"(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

"(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

"(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

"(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

"(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;

"(12) reside at, or participate in the program of, a community correction facility for all or part of the term of probation;

"(13) work in community service as directed by the court;

"(14) reside in a specified place or area, or refrain from residing in a specified place or area;

"(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

"(16) report to a probation officer as directed by the court or the probation officer;

"(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

"(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

"(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

"(20) satisfy such other conditions as the court may impose.

"(c) Modification of Conditions.—The court may, after a hearing, modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

"(d) Written Statement of Conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

"§ 3564. Running of a Term of Probation

"(a) Commencement.—A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

"(b) Concurrence With Other Sentences.—Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any federal, State, or local term of probation, or supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation, except that it does not run during any period in which the defendant is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a federal, State, or local crime.

"(c) Early Termination.—The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

"(d) Extension.—The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

"(e) Subject to Revocation.—A sentence of probation remains conditional and subject to revocation until its expiration or termination.

"§ 3565. Revocation of Probation

"(a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

"(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

"(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

"(b) Delayed Revocation.—The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

"§ 3566. Implementation of a Sentence of Probation

"The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

"Subchapter C—Fines

"Sec.
"3571. Sentence of Fine.
"3572. Imposition of a Sentence of Fine.
"3573. Modification or Remission of Fine.
"3574. Implementation of a Sentence of Fine.

"§ 3571. Sentence of Fine

"(a) In General.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

"(b) Authorized Fines.—Except as otherwise provided, the authorized fines are—

"(1) if the defendant is an individual—

"(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;

"(B) for any other misdemeanor, not more than $25,000; and

"(C) for an infraction, not more than $1,000; and

"(2) if the defendant is an organization—

"(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $1,000,000;

"(B) for any other misdemeanor, not more than $100,000; and

"(C) for an infraction, not more than $10,000.

"§ 3572. Imposition of a Sentence of Fine

"(a) Factors To Be Considered in Imposing Fine.—The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider—

"(1) the factors set forth in section 3553(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

"(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant;

"(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense;

"(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

"(5) any other pertinent equitable consideration.

"(b) Limit on Aggregate of Multiple Fines.—Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

"(c) Effect of Finality of Judgment.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

"(1) modified or remitted pursuant to the provisions of section 3573;

"(2) corrected pursuant to the provisions of rule 35 and section 3742; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"(d) Time and Method of Payment.—At the time a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, payment is due immediately.

"(e) Alternative Sentence Precluded.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

"(f) Individual Responsibility for Payment.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

"§3573. Modification or Remission of Fine

"(a) Petition for Modification or Remission.—A defendant who has been sentenced to pay a fine, and who—

"(1) has paid part but not all thereof, and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the time or method specified, may petition the court for—

"(A) an extension of the time for payment;

"(B) a modification in the method of payment; or

"(C) a remission of all or part of the unpaid portion; or

"(2) has thereafter voluntarily made restitution or reparation to the victim of the offense, may petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

"(b) Order of Modification or Remission.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order.

"§ 3574. Implementation of a Sentence of Fine

"The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

"Subchapter D—Imprisonment

"Sec.
"3581. Sentence of Imprisonment.
"3582. Imposition of a Sentence of Imprisonment.
"3583. Inclusion of a Term of Supervised Release After Imprisonment.
"3584. Multiple Sentences of Imprisonment.
"3585. Calculation of a Term of Imprisonment.
"3586. Implementation of a Sentence of Imprisonment.

"§ 3581. Sentence of Imprisonment

"(a) In General.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

"(b) Authorized Terms.—The authorized terms of imprisonment are—

"(1) for a Class A felony, the duration of the defendant's life or any period of time;

"(2) for a Class B felony, not more than twenty-five years;

"(3) for a Class C felony, not more than twelve years;

"(4) for a Class D felony, not more than six years;

"(5) for a Class E felony, not more than three years;

"(6) for a Class A misdemeanor, not more than one year;

"(7) for a Class B misdemeanor, not more than six months;

"(8) for a Class C misdemeanor, not more than thirty days; and

"(9) for an infraction, not more than five days.

"§ 3582. Imposition of a Sentence of Imprisonment

"(a) Factors To Be Considered in Imposing a Term of Imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

"(b) Effect of Finality of Judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

"(1) modified pursuant to the provisions of subsection (c);

"(2) corrected pursuant to the provisions of rule 35 and section 3742; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

"(1) in any case—

"(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

"(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure;

"(2) in the case of a defendant who has been sentenced to a term of imprisonment in excess of six years, the court, upon motion of the defendant or the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons require such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; but the court may consider only two such motions with respect to a particular defendant, one, after the defendant has served at least six years of his sentence, and a second, after the defendant has served at least the maximum term of imprisonment specified in the applicable guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and

"(3) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

"(d) Inclusion of an Order To Limit Criminal Association of Organized Crime and Drug Offenders.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (Racketeering) or 96 (Racketeer Influenced and Corrupt Organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

"§ 3583. Inclusion of a Term of Supervised Release After Imprisonment

"(a) In General.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

"(b) Authorized Terms of Supervised Release.—The authorized terms of supervised release are—

"(1) for a Class A or Class B felony, not more than three years;

"(2) for a Class C or Class D felony, not more than two years; and

"(3) for a Class E felony, or for a misdemeanor, not more than one year.

"(c) Factors To Be Considered in Including a Term of Supervised Release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

"(d) Conditions of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition—

"(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), and (a)(2)(D);

"(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B) and (a)(2)(D); and

"(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

"(e) Modification of Term or Conditions.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

"(1) terminate a term of supervised release previously ordered and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice; or

"(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the term and conditions of post-release supervision.

"(f) Written Statement of Conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

"§ 3584. Multiple Sentences of Imprisonment

"(a) Imposition of Concurrent or Consecutive Terms.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

"(b) Factors To Be Considered in Imposing Concurrent or Consecutive Terms.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

"(c) Treatment of Multiple Sentences as an Aggregate.—Multiple terms of imprisonment ordered to run consecutively shall be treated for administrative purposes as a single, aggregate term of imprisonment.

"§ 3585. Calculation of a Term of Imprisonment

"(a) Commencement of Sentence.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

"(b) Credit for Prior Custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

"(1) as a result of the offense for which the sentence was imposed; or

"(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

"§ 3586. Implementation of a Sentence of Imprisonment

"The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

"CHAPTER 229—POST-SENTENCE ADMINISTRATION

"Subchapter
"A. Probation 3601
"B. Fines.......... 3611
"C. Imprisonment.......... 3621

"Subchapter A—Probation

"Sec.
"3601. Supervision of Probation.
"3602. Appointment of Probation Officers.
"3603. Duties of Probation Officers.
"3604. Transportation of a Probationer.
"3605. Transfer of Jurisdiction Over a Probationer.
"3606. Arrest and Return of a Probationer.
"3607. Special Probation and Expungement Procedures for Drug Possessor.

"§ 3601. Supervision of Probation

"A person who has been sentenced to probation pursuant to the provisions of subchapter B of chapter 227, or placed on probation pursuant to the provisions of chapter 403, or placed on supervised release pursuant to the provisions of section 3583, shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

"§ 3602. Appointment of Probation Officers

"(a) Appointment.—A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation, and may, in its discretion, remove a probation officer appointed to serve without compensation.

"(b) Record of Appointment.—The order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts.

"(c) Chief Probation Officer.—If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the judicial district.

"§ 3603. Duties of Probation Officers

"A probation officer shall—

"(a) instruct a probationer or a person on supervised release, who is under his supervision as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;

"(b) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;

"(c) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;

"(d) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district;

"(e) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;

"(f) upon request of the Attorney General or his designee, supervise and furnish information about a person within the custody of the Attorney General while on work release, furlough, or other authorized release from his regular place of confinement, or while in prerelease custody pursuant to the provisions of section 3624(c); and

"(g) perform any other duty that the court may designate.

"§ 3604. Transportation of a Probationer

"A court, after imposing a sentence of probation, may direct a United States marshal to furnish the probationer with—

"(a) transportation to the place to which he is required to proceed as a condition of his probation; and

"(b) money, not to exceed such amount as the Attorney General may prescribe, for subsistence expenses while traveling to his destination.

"§ 3605. Transfer of Jurisdiction Over a Probationer

"A court, after imposing a sentence, may transfer jurisdiction over a probationer or person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his probation or release, or is permitted to proceed, with the concurrence of such court. A later transfer of jurisdiction may be made in the same manner. A court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer or releasee that are permitted by this subchapter or subchapter B or D of chapter 227.

"§ 3606. Arrest and Return of a Probationer

"If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him.

"§ 3607. Special Probation and Expungement Procedures for Drug Possessors

"(a) PRE-JUDGMENT PROBATION.—If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)—

"(1) has not, prior to the commission of such offense, been convicted of violating a federal or State law relating to controlled substances; and

"(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

"(b) RECORD OF DISPOSITION.—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

"(c) EXPUNGEMENT OF RECORD OF DISPOSITION.—If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

"Subchapter B—Fines

"Sec.
"3611. Payment of a Fine.
"3612. Collection of an Unpaid Fine.
"3613. Lien Provisions for Satisfaction of an Unpaid Fine.

"§3611. Payment of a Fine

"A person who has been sentenced to pay a fine pursuant to the provisions of subchapter C of chapter 227 shall pay the fine immediately, or by the time and method specified by the sentencing court, to the clerk of the court. The clerk shall forward the payment to the United States Treasury.

"§3612. Collection of an Unpaid Fine

"(a) CERTIFICATION OF IMPOSITION.—If a fine is imposed, the sentencing court shall promptly certify to the Attorney General—

"(1) the name of the person fined;

"(2) his last known address;

"(3) the docket number of the case;

"(4) the amount of the fine imposed;

"(5) the time and method of payment specified by the court;

"(6) the nature of any modification or remission of the fine; and

"(7) the amount of the fine that is due and unpaid.

The court shall thereafter promptly certify to the Attorney General the amount of any subsequent payment that the court may receive with respect to, and the nature of any subsequent remission or modification of, a fine concerning which certification has previously been issued.

"(b) RESPONSIBILITY FOR COLLECTION.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (a). An order of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid.

"§3613. Lien Provisions for Satisfaction of an Unpaid Fine

"(a) LIEN.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b).

"(b) EXPIRATION OF LIEN.—A lien becomes unenforceable and liability to pay a fine expires—

"(1) twenty years after the entry of the judgment; or

"(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(g), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.

"(c) APPLICATION OF OTHER LIEN PROVISIONS.—The provisions of sections 6323, other than 6323(f)(4), 6331 through 6343, 6901, 7402, 7403, 7405, 7423 through 7426, 7505(a), 7506, 7508, 7602 through 7605, 7622, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331 through 6343, 6901, 7402, 7403, 7405, 7423 through 7426, 7505(a), 7506, 7508, 7602 through 7605, 7609, 7610, 7622, 7701, and 7805) and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to 'the Secretary' shall be construed to mean 'the Attorney General,' and references in those sections to 'tax' shall be construed to mean 'fine.'

"(d) EFFECT OF NOTICE OF LIEN.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

"Subchapter C—Imprisonment

"Sec.
"3621. Imprisonment of a Convicted Person.
"3622. Temporary Release of a Prisoner.
"3623. Transfer of a Prisoner to State Authority.
"3624. Release of a Prisoner.
"3625. Inapplicability of the Administrative Procedure Act.

"§ 3621. Imprisonment of a Convicted Person

"(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

"(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the federal government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

"(1) the resources of the facility contemplated;

"(2) the nature and circumstances of the offense;

"(3) the history and characteristics of the prisoner;

"(4) any statement by the court that imposed the sentence—

"(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

"(B) recommending a type of penal or correctional facility as appropriate; and

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

"(c) DELIVERY OF ORDER OF COMMITMENT.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

"(d) Delivery of Prisoner for Court Appearances.—The Bureau of Prisons shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the government.

"§ 3622. Temporary Release of a Prisoner

"The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period, if such release appears to be consistent with the purposes for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that the prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—

"(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

"(1) visiting a relative who is dying;

"(2) attending a funeral of a relative;

"(3) obtaining medical treatment not otherwise available;

"(4) contacting a prospective employer;

"(5) establishing or reestablishing family or community ties; or

"(6) engaging in any other significant activity consistent with the public interest;

"(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

"(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

"(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

"(2) the prisoner agrees to pay to the Bureau such costs incident to his official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

"§ 3623. Transfer of a Prisoner to State Authority

"The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a federal prison facility if—

"(1) the transfer has been requested by the Governor or other executive authority of the State;

"(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

"(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

"§ 3624. Release of a Prisoner

"(a) Date of Release.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

"(b) Credit Toward Service of Sentence for Satisfactory Behavior.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of thirty-six days at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted.

"(c) Pre-Release Custody.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten percent of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his reentry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

"(d) Allotment of Clothing, Funds, and Transportation.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

"(1) suitable clothing;

"(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

"(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

"(e) Supervision After Release.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment. The term runs concurrently with any federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release, except that it does not run during any period in which the person is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a federal, State, or local crime.

"§ 3625. Inapplicability of the Administrative Procedure Act

"The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter."; and

(3) adding the following new sections at the end of chapter 232:

"§ 3671. Transfer of forfeited property for law enforcement purposes

"The Attorney General shall also establish procedures under which a federal government agency may transfer to a State or local law enforcement agency, for law enforcement purposes, personal property in its possession, other than money, that—

"(a) has been forfeited to the United States pursuant to any statute that provides for forfeiture of property used, intended for use, or possessed, in connection with a federal offense; and

"(b) is not needed by a federal law enforcement agency.

If any property cannot be disposed of, the rights to such property shall not revert to the defendant.

"§ 3672. Definitions for sentencing provisions

"As used in chapters 227 and 229—

"(a) 'found guilty' includes acceptance by a court of a plea of guilty or nolo contendere;

"(b) 'commission of an offense' includes the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense; and

"(c) 'law enforcement officer' means a public servant authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of an offense."; and

(4) adding the following caption and sectional analysis at the beginning of new chapter 232:

"CHAPTER 232—MISCELLANEOUS SENTENCING PROVISIONS

"Sec.
"3661. Use of information for sentencing.
"3662. Conviction records.
"3663. Firearms possessed by convicted felons.
"3664. Bribe moneys.
"3665. Liquors and related property; definitions.
"3666. Remission or mitigation of forfeitures under liquor laws; possession pending trial.
"3667. Conveyance carrying liquor.
"3668. Disposition of conveyances seized for violation of the Indian liquor laws.
"3669. Vessels carrying explosives and steerage passengers.
"3670. Duties of Director of Administrative Office of the United States Courts.
"3671. Transfer of forfeited property for law enforcement purposes.
"3672. Definitions for Sentencing Provisions.".

(b) The chapter analysis of Part II of title 18, United States Code, is amended by striking out the items relating to chapters 227, 229, and 231, and inserting in lieu thereof the following:

"227. Sentences	3551
"229. Post-Sentence Administration	3601
"231. Repealed	
"232. Miscellaneous Sentencing Provisions	3661".

Sec. 503. (a) Chapter 235 of title 18, United States Code, is amended by adding the following new section at the end thereof:

"§ 3742. Review of a Sentence

"(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

"(3) was imposed for a felony or a Class A misdemeanor and is greater than—

"(A) the sentence specified in the applicable sentencing guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the maximum established in the guideline; and

"(B) the sentence, if any, specified in a plea agreement under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure.

"(b) Appeal by the Government.—The government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

"(3) was imposed for a felony or a Class A misdemeanor and is less than—

"(A) the sentence specified in the applicable sentencing guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the minimum established in the guideline; and

"(B) the sentence, if any, specified in a plea agreement under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure;

and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

"(c) Record on Review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

"(1) that portion of the record in the case that is designated as pertinent by either of the parties;

"(2) the presentence report; and

"(3) the information submitted during the sentencing proceeding.

"(d) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

"(3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for—

"(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

"(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.

"(e) Decision and Disposition.—If the court of appeals determines that the sentence—

"(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, it shall—

"(A) remand the case for further sentencing proceedings; or

"(B) correct the sentence;

"(2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and—

"(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and—

"(i) remand the case for imposition of a lesser sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a lesser sentence;

"(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and—

"(i) remand the case for imposition of a greater sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a greater sentence; or

"(3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.".

(b) The sectional analysis of chapter 235 of title 18, United States Code, is amended by adding the following new item after the item relating to section 3741:

"3742. Review of a sentence.".

Sec. 504. Chapter 403 of title 18, United States Code, is amended as follows:

(a) Section 5037 is amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by striking out subsections (a) and (b) and inserting the following new subsections in lieu thereof:

"(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (e). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

"(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than seventeen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult;

"(2) in the case of a juvenile who is between seventeen and twenty-one years old, beyond the lesser of—

"(A) three years, or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3564, and 3565 are applicable to an order placing a juvenile on probation.

"(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than seventeen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between seventeen and twenty-one years old—

"(A) who is convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

"(B) in any other case beyond the lesser of—

"(i) three years; or

"(ii) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult.".

(b) Section 5041 is repealed.

(c) Section 5042 is amended by—

(1) striking out "parole or" each place it appears in the caption and text; and

(2) striking out "parolee or"

(d) The sectional analysis is amended by striking out the items relating to sections 5041 and 5042 and inserting in lieu thereof the following:

"5041. Repealed.

"5042. Revocation of probation.".

Sec. 505. The Federal Rules of Criminal Procedure are amended as follows:

(a) Rule 32 is amended—

(1) by deleting subdivision (a)(1) and inserting in lieu thereof the following:

"(1) Imposition of sentence. Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also afford counsel for the defendant an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence. The attorney for the government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the government.";

(2) by adding after the words "right to appeal" in the first sentence of subdivision (a)(2) the words "from the conviction, of his right, if any, to obtain review of the sentence,";

(3) by deleting "right of appeal" in the second sentence of subdivision (a)(2) and inserting in lieu thereof "right to appeal or right to obtain review";

(4) by amending the first sentence of subdivision (c)(1) to read as follows:

"A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.";

"(5) by amenoing subdivision (c)(2) to read as follows:

"(2) Report.—The report of the presentence investigation shall contain—

"(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

"(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

"(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

"(D) verified information stated in a nonargumentative style containing as assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed; and

"(E) such other information as may be required by the court.";

(6) in subdivision (c)(3)(A), by deleting "exclusive of any recommendations as to sentence" and inserting in lieu thereof ", including the information required by subdivision (c)(2) but not including any final recommendation as to sentence,";

(7) by deleting "or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. 4208(b), 4252, 5010(e)" in subdivision (c)(3)(B) and inserting in lieu thereof "pursuant to 18 U.S.C. 3552(b)"; and

(8) by deleting "or imposition of sentence is suspended;" in subdivision (d) and inserting in lieu thereof a comma.

(b) Rule 35 is amended to read as follows:

"Rule 35.—Correction of Sentence

"(a) Correction of a Sentence on Remand.—The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—

"(1) for imposition of a sentence in accord with the findings of the court of appeals; or

"(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

"(b) Correction of Sentence for Changed Circumstances.—The court, on motion of the government, may within one year after the imposition of sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).".

(c) Rule 38 is amended—

(1) by amending the caption to read: "Stay of Execution" and deleting "(a) Stay of Execution.";

(2) by deleting subdivisions (b) and (c);

(3) by redesignating subdivisions (a)(1) through (a)(4) as subdivisions (a) through (d), respectively;

(4) in subdivision (a), by adding "from the conviction or sentence" after "is taken";

(5) in the first sentence of subdivision (b), by adding "from the conviction or sentence" after "is taken";

(6) by deleting "or a fine and costs" in the first sentence of subdivision (c);

(7) by deleting "and costs" in the second sentence of subdivision (c);

(8) by amending subdivision (d) to read as follows:

"(d) Probation.—A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay."; and

(9) by adding new subdivisions (e) and (f) as follows:

"(e) Criminal Forefiture, Notice to Victims, and Restitution.—A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3554, 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction, or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

(f) Disabilities.—A civil or employment disability arising under a federal statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.".

(d) Rule 40 is amended by deleting "3653" in subdivision (d)(1) and inserting in lieu thereof "3605".

(e) Rule 54 is amended—

(1) by amending the definition of "Petty offense" in subdivision (c) to read as follows: "'Petty offense' means a class B or C misdemeanor or an infraction."; and

(2) by adding a new definition as follows: "'Grade' includes the issue whether, for the purposes of section 3571 (Sentence of Fine), a misdemeanor resulted in the loss of human life.".

(f) The Table of Rules that precedes Rule 1 is amended as follows:

(1) The item relating to Rule 35 is amended by deleting the words "or Reduction";

(2) The item relating to Rule 38 is amended to read as follows:

"38. Stay of Execution.
"(a) Death.
"(b) Imprisonment.
"(c) Fine.
"(d) Probation.
"(e) Criminal Forfeiture, Notice to Victims, and Restitution.
"(f) Disabilities.".

Sec. 506. The Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates are amended as follows:

(a) Rule 1 is amended by deleting "(including petty offenses)".

(b) Rule 9 is amended by deleting "as defined in title 18, U.S.C., § 1(3)".

(c) A new Rule 12 is added at the end threof to read as follows:

"Rule 12.—Definitions

"As used in these rules—

"(1) 'minor offense' means a misdemeanor or an infraction;

"(2) 'petty offense' means a Class B or C misdemeanor or an infraction.".

(d) The Table of Rules that precedes Rule 1 is amended by adding at the end thereof the following new item:

"12. Definitions".

Sec. 507. (a) Title 28 of the United States Code is amended by adding the following new chapter after chapter 57:

"CHAPTER 58—UNITED STATES SENTENCING COMMISSION

"Sec.
"991. United States Sentencing Commission; Establishment and Purpose.
"992. Terms of Office; Compensation.
"993. Powers and Duties of Chairman.
"994. Duties of the Commission.
"995. Powers of the Commission.
"996. Director and Staff.
"997. Annual Report.
"998. Definitions.

"§ 991. United States Sentencing Commission; Establishment and Purpose

"(a) There is established as an independent commission in the judicial branch a United States Sentencing Commission which shall consist of seven voting members and one non-voting member. The President, after consultation with the Judicial Conference of the United States, shall appoint, by and with the advice and consent of the Senate, four members of the United States Sentencing Commission, one of whom shall be appointed, by and with the advice and consent of the Senate, as the chairman. Not more than three of the members of the United States Sentencing Commission appointed by the President shall be members of the same political party. The Judicial Conference shall submit to the President, to the Committee on the Judiciary of the Senate, and to the Committee of the Judiciary of the House of Representatives, a list of at least ten judges of the United States whom the Conference considers best qualified to serve on the Commission. The President shall designate three of the judges from the list of recommended judges submitted by the Conference to serve on the Commission. Prior to consulting with, or submitting a list to, the President, the Judicial Conference shall obtain and give consideration to the recommendations of the district judge members of the Judicial Councils of the federal judicial circuits. The Attorney General, or his designee, shall be an ex officio, non-voting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown. The Commission shall have both judicial and non-judicial members and shall, to the extent practicable, have a membership representing a variety of backgrounds and reflecting participation and interest in the criminal justice process, including one federal prosecutor and one attorney who regularly represents defendants in federal criminal cases.

"(b) The purposes of the United States Sentencing Commission are to—

"(1) establish sentencing policies and practices for the federal criminal justice system that—

"(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

"(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

"(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

"(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

"§ 992. Terms of Office; Compensation

"(a) The voting members of the United States Sentencing Commission shall be designated or appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that—

"(1) one member designated by the President from the list of recommended judges submitted by the Judicial Conference and the chairman serve terms of six years;

"(2) one member designated by the President from the list of recommended judges submitted by the Judicial Conference and two members appointed by the President serve terms of four years; and

"(3) one member designated by the President from the list of recommended judges submitted by the Judicial Conference and one member appointed by the President serve terms of two years.

"(b) No voting member may serve more than two full terms. A voting member designated or appointed to fill a vacancy that occurs before the expiration of the term for which his predecessor was designated or appointed shall be designated or appointed only for the remainder of such term.

"(c) Each voting member of the Commission shall be compensated during the term of office as a member of the Commission at the rate at which judges of the United States courts of appeals are compensated. A federal judge may serve as a member of the Commission without resigning his appointment as a federal judge.

"§ 993. Powers and Duties of Chairman

"The Chairman shall—

"(a) call and preside at meetings of the Commission; and

"(b) direct—

"(1) the preparation of requests for appropriations for the Commission; and

"(2) the use of funds made available to the Commission.

"§ 994. Duties of the Commission

"(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

"(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

"(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

"(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

"(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

"(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively;

"(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18 United States Code, including the appropriate use of—

"(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

"(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

"(C) the sentence modification provisions set forth in sections 3563(c), 3573, and 3582(c) of title 18;

"(D) the authority granted under Rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to Rule 11(e)(1); and

"(E) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

"(3) guidelines or general policy statements regarding appropriate use of the probation revocation provisions set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18.

"(b) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 percent.

"(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among other, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

"(1) the grade of the offense;

"(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

"(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

"(4) the community view of the gravity of the offense;

"(5) the public concern generated by the offense;

"(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

"(7) the current incidence of the offense in the community and in the nation as a whole.

"(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

"(1) age;

"(2) education;

"(3) vocational skills;

"(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

"(5) physical condition, including drug dependence;

"(6) previous employment record;

"(7) family ties and responsibilities;

"(8) community ties;

"(9) role in the offense;

"(10) criminal history; and

"(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

"(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

"(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

"(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make appropriate recommendations to the Congress concerning such facilities and services.

"(h) The Commission shall assure that the guidelines will specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

"(1) has a history of two or more prior federal, State, or local felony convictions for offenses committed on different occasions;

"(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

"(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

"(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a federal, State, or local felony for which he was ultimately convicted; or

"(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

"(g) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

"(h) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

"(i) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

"(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

"(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

"(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (Penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (Penalty for an offense committed while on release) of title 18; and

"(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(j) The Commission, as a starting point in its development of the initial sets of guidelines for particular categories of cases, shall review the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served, but the Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

"(k) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever it believes such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

"(l) The Commission, at or after the beginning of a regular session of Congress but not later than the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.

"(m) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

"(1) modernization of existing facilities;

"(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

"(3) use of existing federal facilities, such as those currently within military jurisdiction.

"(n) The Commission shall evaluate the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration, and shall, by affirmative vote of a majority of the voting members of the Commission, issue a report of its findings to all appropriate courts, the Department of Justice, and the Congress.

"(o) The Commission, within three years of the date of enactment of the Sentencing Reform Act of 1982, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

"(p) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

"(1) the community view of the gravity of the offense;

"(2) the public concern generated by the offense; and

"(3) the deterrent effect particular sentences may have on the commission of the offense by others.

Within 180 days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

"(q) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(2) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

"(r) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify by what amount the sentences of prisoners serving terms of imprisonment that are outside the applicable guideline ranges for the offense may be reduced in order to carry out the purpose of the reduction.

"(s) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

"(t) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendation for legislation that the Commission concludes is warranted by that analysis.

"(u) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

"§ 995. Powers of the Commission

"(a) The Commission, by vote of a majority of the members present and voting, shall have the power to—

"(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

"(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332);

"(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

"(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

"(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

"(6) without regard to section 3648 of the Revised Statutes of the United States (31 U.S.C. 529), enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

"(7) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes of the United States (31 U.S.C. 665(b));

"(8) request such information, data, and reports from any federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

"(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

"(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

"(11) arrange with the head of any other federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

"(12) establish a research and development program within the Commission for the purpose of—

"(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices;

"(B) assisting and serving in a consulting capacity to federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

"(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

"(14) publish data concerning the sentencing process;

"(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

"(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

"(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

"(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

"(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

"(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy;

"(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

"(22) perform such other functions as are required to permit federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to permit others involved in the federal criminal justice system to meet their related responsibilities.

"(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a) (1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall coordinate its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, with any related activities of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.

"(c) Upon the request of the Commission, each federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

"(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

"(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member of any action taken by it.

"§ 996. Director and Staff

"(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.

"(b) The Staff Director shall, subject to the approval of the Commission, appoint such officers and employees as are necessary in the execution of the functions of the Commission. The officers and employees of the Commission shall be exempt from the provisions of part III of title 5, United States Code, except the following chapters: 81 (Compensation for Work Injuries), 83 (Retirement), 85 (Unemployment Compensation) 87 (Life Insurance), 89 (Health Insurance), and 91 (Conflicts of Interest).

"§ 997. Annual Report

"The Commission shall report annually to the Judicial Conference of the United States, the Congress, and the President of the United States on the activities of the Commission.

"§ 998. Definitions

"As used in this chapter—

"(a) 'Commission' means the United States Sentencing Commission;

"(b) 'Commissioner' means a member of the United States Sentencing Commission;

"(c) 'guidelines' means the guidelines promulgated by the Commission pursuant to section 994(a) of this title; and

"(d) 'rules and regulations' means rules and regulations promulgated by the Commission pursuant to section 995 of this title.".

The chapter analysis of part III of title 28, United States Code, is amended by adding after the item relating to chapter 57 the following new item:

"58. United States Sentencing Commission .... 991".

REPEALERS

Sec. 508 (a) The following provisions of title 18, United States Code, are repealed:

(1) section 1;

(2) chapter 309;

(3) chapter 311;

(4) chapter 314;

(5) sections 4281, 4283, and 4284; and

(6) chapter 402.

(b) The item relating to section 1 in the sectional analysis of chapter 1 of title 18, United States Code, is amended to read: "1. Repealed.".

(c) The chapter analysis of Part III of title 18, United States Code, is amended by amending the items relating to—

(1) chapters 309 and 311 to read as follows:

"309 Repealed ....

"311 Repealed .... ";

and

(2) chapter 314 to read as follows:

"314. Repealed .... ".

(d) The sectional analysis of chapter 315 of title 18, United States Code, is amended by amending the items relating to—

(1) section 4281 to read "4281. Repealed."; and

(2) sections 4283 and 4284 to read as follows:

"4283. Repealed.

"4284. Repealed.".

(e) The item relating to chapter 402 in the chapter analysis of Part IV of title 18, United States Code, is amended to read as follows:

"402. Repealed .... ".

Sec. 509. (a) Sections 404(b) and 409 of the Controlled Substances Act (21 U.S.C. 844(b) and 849) are repealed.

(b) Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by deleting the designation "(a)" at the beginning of the subsection.

TECHNICAL AND CONFORMING AMENDMENTS

Sec. 510. The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended as follows:

(a) the second sentence of section 212(a)(9) (8 U.S.C. 1182(a)(9)) is amended to read: "An alien who would be excludable because of the conviction of an offense for which the sentence actually imposed did not exceed a term of imprisonment in excess of six months, or who would be excludable as one who admits the commission of an offense for which a sentence not to exceed one year's imprisonment might have been imposed on him, may be granted a visa and admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.".

(b) Section 242(h) (8 U.S.C. 1252(h)) is amended by adding "supervised release," after "parole,".

Sec. 511. Section 4 of the Act of September 28, 1962 (16 U.S.C. 460k-3) is amended by deleting "petty offense (18 U.S.C. 1)" and substituting "misdemeanor".

Sec. 512. Section 9 of the Act of October 8, 1964 (16 U.S.C. 460n-8) is amended—

(a) in the first paragraph, by deleting "commissioner" each place it appears and substituting "magistrate"; and

(b) in the second paragraph, by amending the first sentence to read: "The functions of the magistrate shall include the trial and sentencing of persons charged with the commission of misdemeanors and infractions as defined in section 3581 of title 18, United States Code."

Sec. 513. Title 18 of the United States Code is amended as follows:

(a) Section 924(a) is amended by deleting ", and shall become eligible for parole as the Board of Parole shall determine".

(b) Section 1161 is amended by deleting "3618" and inserting in lieu thereof "3667".

(c) Section 1761(a) is amended by adding ", supervised release," after "parole".

(d) Section 1963 is amended—

(1) in subsection (a), by deleting "(1) any interest he has acquired" and all through the end of the subsection and substituting "the property described in section 3554 in accord with the provisions of that section."; and

(2) by repealing subsections (b) and (c).

(e) Section 3006A is amended—

(1) in subsections (a)(1) and (b), by deleting "misdemeanor (other than a petty offense as defined in section 1 of this title)" each place it appears and substituting "Class A misdemeanor"; and

(2) in subsections (a)(3) and (g), deleting "subject to revocation of parole," each place it appears.

(f) Section 3143, as amended by this Act, is amended—

(1) in subsection (a), by adding "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C.

994 does not recommend a term of imprisonment," after "sentence,"; and

(2) in subsection (c), by adding the following at the end thereof: "The judge shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3742 in accordance with the provisions of—

"(1) subsection (a) if the person has been sentenced to a term of imprisonment; or

"(2) section 3142 if the person has not been sentenced to a term of imprisonment.".

(g) Section 3147, as amended by this Act, is amended—

(1) in paragraph (1), by deleting "not less than two years and"; and

(2) in paragraph (2), by deleting "not less than ninety days and".

(h) Section 3156(b)(2) is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction".

(i) Section 3172(2) is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction".

(j) Section 3401 is amended—

(1) by repealing subsection (g); and

(2) in subsection (h), by deleting "petty offense case" and substituting "Class B or C misdemeanor case, or infraction case,".

(k) Section 3668 (formerly section 3619) is amended by deleting "3617" and "3618" and substituting "3666" and "3667", respectively.

(l) Section 4004 is amended by deleting "record clerks, and parole officers" and substituting "and record clerks".

(m) Chapter 306 is amended as follows:

(1) Section 4101 is amended—

(A) in subsection (f), by adding ", including a term of supervised release pursuant to section 3583" after "supervision"; and

(B) in subsection (g), by deleting "to a penalty of imprisonment the execution of which is suspended and" and substituting "under which", and by deleting "the suspended" and substituting "a".

(2) Section 4105(c) is amended—

(A) in paragraph (1), by deleting "for good time" the second place it appears and substituting "toward service of sentence for satisfactory behavior";

(B) in paragraphs (1) and (2), by deleting "section 4161" and substituting "section 3624(b)";

(C) in paragraph (1), by deleting "section 4164" and substituting "section 3624(a)"

(D) by repealing paragraph (3); and

(E) by amending paragraph (4) to read as follows:

"(4) Credit toward service of sentence may be withheld as provided in section 3624(b) of this title.".

(3) Section 4106 is amended—

(A) in subsection (a), by deleting "Parole Commission" and substituting "Probation System";

(B) by amending subsection (b) to read as follows:

"(b) An offender transferred to the United States to serve a sentence of imprisonment shall be released pursuant to section 3624(a) of this title after serving the period of time specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1). He shall be released to serve a term of supervised release for any term specified in the applicable guideline. The provisions of section 3742 of this title apply to a sentence under this subsection, and the United States court of appeals for the district in which the offender is imprisoned or under supervision after transfer to the United States has jurisdiction to review the sentence as though it had been imposed by the United States district court."; and

(C) by repealing subsection (c).

(4) Section 4108(a) is amended by adding ", including any term of imprisonment or term of supervised release specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1)," after "consequences thereof".

(n) Section 4321 is amended by deleting "parole or".

(o) Section 4351(b) is amended by deleting "Parole Board" and substituting "Sentencing Commission".

(p) Section 5002 is amended by deleting "Board of Parole, the Chairman of the Youth Division," and substituting "United States Sentencing Commission,".

Sec. The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended as follows:

(a) Section 401 (21 U.S.C. 841) is amended—

(1) in subsection (b)(1)(A), by deleting the last sentence;

(2) in subsection (b)(1)(B), by deleting the last sentence;

(3) in subsection (b)(2), by deleting the last sentence;

(4) in subsection (b)(4), by deleting "subsections (a) and (b) of", and by adding "and section 3607 of title 18, United States Code" after "404";

(5) in subsection (b)(5), by deleting the last sentence; and

(6) by repealing subsection (c).

(b) Section 405 (21 U.S.C. 845) is amended—

(1) in subsection (a), by deleting "(1)" the second place it appears, and by deleting ", and (2) at least twice any special parole term authorized by section 401(b), for a first offense involving the same controlled substance and schedule"; and

(2) in subsection (b), by deleting "(1)" the second place it appears, and by deleting ", and (2) at least three times any special parole term authorized by section 401(b), for a second or subsequent offense involving the same controlled substance and schedule".

(c) Section 405A, as added by title IX of this Act, is amended—

(1) in subsection (a)—

(A) by deleting "(1)"; and

(B) by deleting "and (2) at least twice any special parole term authorized by section 401(b) for a first offense involving the same controlled substance and schedule";

(2) in subsection (b)—

(A) by deleting "(1)" and "not less than three years and"; and

(B) by deleting "and (2) at least three times any special term authorized by section 401(b) for a second or subsequent offense involving the same controlled substance and schedule"; and

(3) by deleting subsection (c).

(d) Section 408(c) (21 U.S.C. 848(c)) is amended by deleting "and section 4202 of title 18 of the United States Code".

Sec. 515. The Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) is amended as follows:

(a) Section 1010 (21 U.S.C. 960) is amended—

(1) in subsection (b)(1), by deleting the last sentence;

(2) in subsection (b)(2), by deleting the last sentence; and

(b) Section 1012(a) (21 U.S.C. 962(a)) is amended by deleting the last sentence.

Sec. 516. Section 114(b) of title 23, United States Code, is amended by adding ", supervised release," after "parole".

Sec. 517. Section 5871 of the Internal Revenue Code of 1954 (26 U.S.C. 5871) is amended by deleting ", and shall become eligible for parole as the Board of Parole shall determine".

Sec. 518. Title 28 of the United States Code is amended as follows:

(a) Section 509 is amended—

(1) in paragraph (3), by deleting "; and" and substituting a period; and

(2) by repealing paragraph (4).

(b) Section 591(a) is amended by deleting "petty offense" and substituting "Class B or C misdemeanor or an infraction".

(c) Section 2901 is amended—

(1) in subsection (e), by deleting "section" and substituting "section 3581"; and

(2) in subsection (g)(3),

by adding ", supervised release," after "parole", and by adding "supervised release," after "parole,".

Sec. 519. Section 504(a) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504(a)) and section 411(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(a)) are amended—

(a) by deleting "Board of Parole of the United States Department of Justice" and substituting "if the offense is a Federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the attorney for the government, the district court of the United States for the district in which the offense was committed";

(b) by adding ", pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a),";

(c) by deleting "Board" and "Board's" and substituting "court" and "court's", respectively; and

(d) by deleting "an administrative" and substituting "a".

Sec. 520. Section 411(c)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(c)(3)) is amended by adding "or supervised release" after "parole".

Sec. 521. Section 454(b) of the Comprehensive Employment and Training Act of 1973, as added by section 2 of the Act of October 27, 1978 (29 U.S.C. 927(b)), is amended by deleting "or parole" the first place it appears and substituting ", parole, or supervised release".

Sec. 522. The Public Health Service Act (42 U.S.C. et seq.) is amended as follows:

(a) Section 341(a) (42 U.S.C. 257(a)) is amended by deleting "or convicted of offenses against the United States and sentenced to treatment" and "addicts who are committed to the custody of the Attorney General pursuant to provisions of the Federal Youth Corrections Act (chapter 402 of title 18 of the United States Code),".

(b) Section 343(d) (42 U.S.C. 259(d)) is amended by adding "or supervised release" after "parole".

Sec. 523. Section 11507 of title 49, United States Code, is amended by adding ", supervised release," after "parole".

Sec. 524. Section 10(b)(7) of the Military Selective Service Act (50 U.S.C. App. 460(b)(7)) is amended by deleting "parole" and substituting "release".

EFFECTIVE DATE

Sec. 525. (a)(1) This title shall take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment, except that—

(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment; and

(B)(i) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1982, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulgated pursuant to section 994(a)(1) of title 28 to the Congress within eighteen months of the effective date of the chapter; and

(ii) the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583 and 3624 of title 18, United States Code, shall not go into effect until the day after—

(a) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to subparagraph (B)(i), along with a report stating the reasons for the Commission's recommendations;

(b) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and has, within three months of the submission of the guidelines, reported to the Congress the results of its study; and

(c) the Congress has had six months after the date described in subclause (a) in which to examine the guidelines and consider the reports.

(2) For the purposes of section 992(a) of title 28, the terms of the first members of the United States Sentencing Commission shall not begin to run until the sentencing guidelines go into effect pursuant to paragraph (1)(B)(ii).

"(b)(1) The following provisions of law in effect on the day before the effective date of this Act shall remain in effect for five years after the effective date as to an individual convicted of an offense or adjudicated to be a juvenile delinquent before the effective date and as to a term of imprisonment during the period described in subsection (a)(1)(B):

(A) Chapter 311 of title 18, United States Code.

(B) Chapter 309 of title 18, United States Code.

(C) Sections 4254 through 4255 of title 18, United States Code.

(D) Sections 5041 and 5042 of title 18, United States Code.

(E) Sections 5017 through 5020 of title 18, United States Code, as to a sentence imposed before the date of enactment.

(F) The maximum term of imprisonment in effect on the effective date for an offense committed before the effective date.

(G) Any other law relating to a violation of a condition of release or to arrest authority with regard to a person who violates a condition of release.

(2) Notwithstanding the provisions of section 4202 of title 18, United States Code, as in effect on the day before the effective date of this Act, the term of office of a Commissioner who is in office on the effective date is extended to the end of the five-year period after the effective date of this Act.

(3) The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, that is the earliest date that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

(4) Notwithstanding the other provisions of this subsection, all laws in effect on the day before the effective date of this Act pertaining to an individual who is—

(A) released pursuant to a provision listed in paragraph (1); and

(B)(i) subject to supervision on the day before the expiration of the five-year period following the effective date of this Act; or

(ii) released on a date set pursuant to paragraph (3);

including laws pertaining to terms and conditions of release, revocation of release, provision of counsel, and payment of transportation costs, shall remain in effect as to that individual until the expiration of his sentence, except that the district court shall determine, in accord with the Federal Rules of Criminal Procedure, whether release should be revoked or the conditions of release amended for violation of a condition of release.

(5) Notwithstanding the provisions of section 991 of title 28, United States Code, and sections 4351 and 5002 of title 18, United States Code, the Chairman of the United States Parole Commission or his designee shall be a member of the National Institute of Corrections, and the Chairman of the United States Parole Commission shall be a member of the Advisory Corrections Council and a non-voting member of the United States Sentencing Commission, ex officio, until the expiration of the five-year period following the effective date of this Act. Notwithstanding the provisions of section 4351 of title 18, during that five-year period the National Institute of Corrections shall have seventeen members, including seven ex officio members. Notwithstanding the provisions of section 991 of title 28, during the five-year period the United States Sentencing Commission shall consist of nine members, including two ex officio, non-voting members.

TITLE VI—CRIMINAL FORFEITURE

SEC. 601. This title may be cited as the "Comprehensive Criminal Forfeiture Act of 1982".

PART A

SEC. 602. Section 1963 of title 18, United States Code, is amended to read as follows:

"§ 1963. Criminal penalties

"(a) Whoever violates any provision of section 1962 of this chapter—

"(1) shall be fined not more than $25,000 or imprisoned for not more than twenty years, or both; and

"(2) shall forfeit to the United States any property, irrespective of any provision of State law—

"(A) constituting, or derived from, any interest in or contribution to an enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 of this chapter;

"(B) constituting a means by which he has exerted influence or control over any enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the acquisition, maintenance, establishment, operation, conduct or control of, in violation of section 1962 of this chapter; and

"(C) constituting, or derived from, any proceeds which he obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 of this chapter.

The court, in imposing sentence on such person, shall order, in addtion to any other sentence imposed pursuant to this section, that he forfeit to the United States all property described in paragraph (2).

"(b) Property subject to criminal forfeiture under this section includes—

"(1) real property, including things growing on, affixed to, and found in land; and

"(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities including, but not limited to—

"(A) any position, office, appointment, tenure, commission, or employment contract of any kind which the incumbent acquired or maintained in violation of section 1962 of this chapter, through which the incumbent conducted, or participated in or facilitated the conduct of, the affairs of an enterprise in violation of section 1962 of this chapter, or which afforded the incumbent a source of influence or control over the affairs of an enterprise which was exercised in violation of section 1962 of this chapter,

"(B) any compensation, right or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in subparagraph (A) which the incumbent obtained, directly or indirectly, through a pattern of racketeering activity or unlawful debt collection in violation of section 1962 of this chapter, or which accrued to the incumbent during the period that he controlled, influenced, conducted, or participated in or facilitated the conduct of, the affairs of the enterprise in violation of section 1962 of this chapter; and

"(C) any amount payable or paid under any contract for goods or services which was awarded or performed through a pattern of racketeering activity or unlawful debt collection.

"(c) All right, title, and interest in property described in subsection (a)(2) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: *Provided*, That the Attorney General shall not direct disposition of any such property if, in a proceeding under subsection (h), the person establishes to the Attorney General by evidence contained in a petition, or the Attorney General otherwise has reason to know, that—

"(1) the person was a bona fide purchaser of the property for value; and

"(2) the person was reasonably without cause to believe that the property was of the type described in subsection (a)(2).

"(d) If any of the property described in subsection (a)(2)—

"(1) cannot be located,

"(2) has been transferred to, sold to, or deposited with, a third party,

"(3) has been placed beyond the jurisdiction of the court,

"(4) has been substantially diminished in value by any act or omission of the defendant, or

"(5) has been commingled with other property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

"(e)(1) Upon application of the United States, the court may, after a hearing with respect to which any adverse parties have been given reasonable notice and opportunity to participate, enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a)(2) for forfeiture under this section—

"(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

"(B) prior to the filing of such an indictment or information, if the court determines—

"(i) that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered, and

"(ii) that the party against whom the order is to be entered has failed to demonstrate that the entry of the requested order would result in substantial and irreparable harm or injury to him that outweighs the need to preserve the availability of the property through the entry of the requested order:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

"(2) Upon application of the United States, a temporary restraining order to preserve the availability of property described in subsection (a)(2) for forfeiture under this section may be granted without notice to the adverse party or his attorney if—

"(A) an indictment or information described in paragraph (1)(A) has been filed or if the court determines that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered; and

"(B) the court determines that the nature of the property is such that it can be concealed, disposed of, or placed beyond the jurisdiction of the court before the adverse party may be heard in opposition.

A temporary order granted without notice to the adverse party shall expire within such time, not to exceed ten days, as the court fixes, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. If a temporary restraining order is granted without notice to the adverse party, a hearing concerning the entry of an order under paragraph (1) shall be held at the earliest possible time and prior to the expiration of the temporary order.

"(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from an enterprise, or an interest in an enterprise, ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

"(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. The proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall forward to the Treasurer of the United States for deposit in the general fund of the United States Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

"(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

"(1) grant petitions for mitigation, or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

"(2) compromise claims arising under this chapter;

"(3) award compensation to persons providing information resulting in a forfeiture under this section;

"(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

"(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

A person who has filed a petition for remission or mitigation of forfeiture under this subsection, and who is dissatisfied with the Attorney General's decision regarding his petition, may obtain review of the Attorney General's decision in the the district court in which the order of forfeiture was entered. The court shall set aside the decision of the Attorney General if it finds, based on the record of the petition proceedings, that the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(i) The Attorney General shall within one hundred and eighty days of the enactment of this Act promulgate regulations with respect to—

"(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

"(2) granting petitions for remission or mitigation of forfeiture;

"(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

"(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

"(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

"(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

"(j) Except as provided in this section, no party claiming an interest in property subject to forfeiture under this section may—

"(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

"(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property, prior to or during the trial or appeal of the criminal case, or during the period in which any petition for remission or mitigation of forfeiture is pending before the Attorney General.

"(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

"(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under rule 15 of the Federal Rules of Criminal Procedure.".

PART B

SEC. 603. Part D of title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended by adding at the end thereof the following new section:

"CRIMINAL FORFEITURES

"Property Subject to Criminal Forfeiture

"SEC. 413. (a) Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

"(1) any property constituting, or derived from, any proceeds he obtained, directly or indirectly as the result of such violation;

"(2) any of this property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

"(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of this title (21 U.S.C. 848), he shall forfeit, in addition to any property described in paragraphs (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this title or title III, that he forfeit to the United States all property described in this subsection.

"Meaning of Term 'Property'

"(b) Property subject to criminal forfeiture under this section includes—

"(1) real property, including things growing on, affixed to, and found in land; and

"(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

"Third Party Transfers

"(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: *Provided*, That the Attorney General shall not direct disposition of any such property if, in a proceeding under subsection (i), the person establishes to the Attorney General by evidence contained in a petition for remission or mitigation of forfeiture, or the Attorney General otherwise has reason to know, that—

"(1) the person was a bona fide purchaser of the property for value; and

"(2) the person was reasonably without cause to believe that the property was of the type described in subsection (a).

"Substitute Assets

"(d) If any of the property described in subsection (a)—

"(1) cannot be located,

"(2) has been transferred to, sold to, or deposited with a third party,

"(3) has been placed beyond the jurisdiction of the court,

"(4) has been substantially diminished in value by any act or omission of the defendant, or

"(5) has been commingled with other property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

"Protective Orders

"(e)(1) Upon application of the United States, the court may, after a hearing with respect to which any adverse parties have been given reasonable notice and opportunity to participate, enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

"(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

"(B) prior to the filing of such an indictment or information, if the court determines—

"(i) that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered, and

"(ii) that the party against whom the order is to be entered has failed to demonstrate that the entry of the requested order would result in substantial and irreparable harm or injury to him that outweighs the need to preserve the availability of the property through the entry of the requested order:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

"(2) Upon application of the United States, a temporary restraining order to preserve the availability of property described in subsection (a) for forfeiture under this section may be granted without notice to the adverse party or his attorney if—

"(A) an indictment or information described in paragraph (1)(A) has been filed or if the court determines that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered; and

"(B) the court determines that the nature of the property is such that it can be concealed, disposed of, or placed beyond the jurisdiction of the court before the adverse party may be heard in opposition.

A temporary order granted without notice to the adverse party shall expire within such time, not to exceed ten days, as the court fixes, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. If a temporary restraining order is granted without notice to the adverse party, a hearing concerning the entry of an order under paragraph (1) shall be held at the earliest possible time and prior to the expiration of the temporary order.

"Warrant of Seizure

"(f) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (f) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

"Execution

"(g) Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

"DISPOSITION OF PROPERTY

"(h) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

"AUTHORITY OF THE ATTORNEY GENERAL

"(i) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

"(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

"(2) compromise claims arising under this chapter;

"(3) award compensation to persons providing information resulting in a forfeiture under this section;

"(4) direct the disposition by the United States, in accordance with the provisions of section 511(e) of this title (21 U.S.C. 881(e)), of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

"(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

A person who has filed a petition for remission or mitigation of forfeiture under this subsection, and who is dissatisfied with the Attorney General's decision regarding his petition, may obtain review of the Attorney General's decision in the district court in which the order of forfeiture was entered. The court shall set aside the decision of the Attorney General if it finds, based on the record of the petition proceedings, that the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"APPLICABILITY OF CIVIL FORFEITURE PROVISIONS

"(j) Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 511(d) of this title (21 U.S.C. 881(d)) shall apply to a criminal forfeiture under this section.

"BAR ON INTERVENTION; EXHAUSTION OF ADMINISTRATIVE REMEDIES

"(k) Except as provided in this section, no party claiming an interest in property subject to forfeiture under this section may—

"(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

"(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property, prior to or during the trial or appeal of the criminal case, or during the period in which any petition for remission or mitigation of forfeiture is pending before the Attorney General.

"JURISDICTION TO ENTER ORDERS

"(l) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

"DEPOSITIONS

"(m) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under rule 15 of the Federal Rules of Criminal Procedure.".

SEC. 604. Section 304 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 824) is amended by adding at the end of subsection (f) the following sentence: "All right, title, and interest in such controlled substances shall vest in the United States upon a revocation order becoming final.".

SEC. 605. Section 408 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 848) is amended—

(a) in subsection (a)—

(1) by striking out "(1)";

(2) by striking our "paragraph (2)" each time it appears, and inserting in lieu thereof "section 413 of this title"; and

(3) by striking out paragraph (2); and

(b) by striking out subsection (d).

SEC. 606. Section 511 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881) is amended—

(a) in subsection (a) by inserting at the end thereof the following new subsection:

"(7) All real property, including any appurtenances to or improvements on such property, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.";

(b) in subsection (b)—

(1) by inserting "civil or criminal" after "Any property subject to"; and

(2) by striking out in paragraph (4) "has been used or is intended to be used in violation of" and inserting in lieu thereof "is subject to civil or criminal forfeiture under";

(c) in subsection (c)—

(1) by inserting in the second sentence "any of" after "Whenever property is seized under"; and

(2) by inserting in paragraph (3) ", if practicable," after "remove it";

(d) in subsection (d) by inserting "any of" after "alleged to have been incurred, under";

(e) in subsection (e)—

(1) by inserting "civilly or criminally" in the first sentence after "Whenever property is"; and

(2) by striking out in paragraph (3) "remove it for disposition" and inserting in lieu thereof "and dispose of it"; and

(f) by inserting at the end thereof the following new subsections:

"(h) All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

"(i) Pending, or upon, the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under section 413 of this title, and alleging that property would, in the event of conviction, be subject to criminal forfeiture, any civil forfeiture proceeding concerning such property commenced under this section shall, for good cause shown, be stayed pending disposition of the criminal case.".

SEC. 607. Part A of title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended by adding at the end thereof the following new section:

"CRIMINAL FORFEITURES

"SEC. 1017. Section 413 of title II, relating to criminal forfeitures, shall apply in every respect to a violation of this title punishable by imprisonment for more than one year.".

SEC. 608. The table of contents of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended—

(a) by adding immediately after

"Sec. 412. Applicability of treaties and other international agreements."

the following new item:

"Sec. 413. Criminal forfeitures."; and

(b) by adding immediately after

"Sec. 1016. Authority of Secretary of the Treasury."

the following new item:

"Sec. 1017. Criminal forfeitures.".

PART C

SEC. 609. (a) Without regard to the provisions of section 3617 of the Revised Statutes (31 U.S.C. 484), the Drug Enforcement Administration is authorized to set aside 25 per centum of the net amount of money realized from the forfeiture of assets seized by it under any provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.) to be available for obligation and expenditure only for the purpose of paying awards of compensation with respect to such forfeitures as described in subsection (b). The amounts credited under this section shall be made available during the fiscal year in which moneys are realized, except for those proceeds realized from seizures occurring prior to September 30, 1984, which may remain available for the purpose of making awards related to forfeitures arising from such seizures. The remaining 75 per centum of the net amount of money realized from such forfeitures shall be paid to the miscellaneous receipts of the Treasury and any unobligated balances remaining at the end of each fiscal year of the 25 per centum set aside shall be paid into the miscellaneous receipts of the Treasury.

(b) From the amounts set aside under subsection (a), the Drug Enforcement Administration is authorized to pay, totally within its discretion, awards to any entity not an agency or instrumentality of the United States, or to any person not an officer or employee of the United States or of any State or local government, that provides information or assistance which leads to a forfeiture referred to in subsection (a). Such awards can be made in any amount up to 25 per centum of the net amount realized from the forfeiture, or $50,000, whichever is lesser, in any case, except that no award shall be made based on the value of the contraband.

(c) The authority provided by this section shall expire on September 30, 1984: *And provided further*, That the Attorney General shall conduct detailed financial audits, semiannually, of the expenditure of funds from this account.

TITLE VII—OFFENDERS WITH MENTAL DISEASE OR DEFECT

SEC. 701. (a) Chapter 313 of title 18, United States Code, is amended to read as follows:

"CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

"Sec.

"4241. Determination of Mental Competency to Stand Trial.

"4242. Determination of the Existence of Insanity at the Time of the Offense.

"4243. Hospitalization of a Person Acquitted by Reason of Insanity.

"4244. Hospitalization of a Convicted Person Suffering from Mental Disease or Defect.

"4245. Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect.

"4246. Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect.

"4247. General Provisions for Chapter.

"§ 4241. Determination of Mental Competency to Stant Trial

"(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist in his defense.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

"(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

"(2) for an additional reasonable period of time until—

"(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

"(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

"(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

"(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

"§ 4242. Determination of the Existence of Insanity at the Time of the Offense

"(a) INSANITY DEFENSE.—It is a defense to a prosecution under any Federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.

"(b) MOTION FOR PRETRIAL PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense set forth in subsection (a), the court, upon motion of the attorney for the government, may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty only by reason of insanity.

"§ 4243. Hospitalization of a Person Acquitted by Reason of Insanity

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (d).

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the acquitted person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

"(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

"(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"§ 4244. Hospitalization of a Convicted Person Suffering From Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF CONVICTED DEFENDANT.—A defendant found guilty of an offense, or the attorney for the government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives available under chapter 227 of this title that could best accord the defendant the kind of treatment he does need.

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed.

"(e) Discharge.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under chapter 227.

"§ 4245. Hospitalization of an Imprisoned Person Suffering From Mental Disease or Defect

"(a) Motion To Determine Present Mental Condition of Imprisoned Defendant.—If a defendant serving a sentence of imprisonment objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the government, at the request of the director of the facility in which the defendant is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court shall grant the motion if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

"(b) Psychiatric or Psychological Examination and Report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) Determination and Disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of his sentence of imprisonment, whichever occurs earlier.

"(e) Discharge.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned until the date of his release pursuant to section 3624.

"§ 4246. Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect

"(a) Institution of Proceeding.—If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

"(b) Psychiatric or Psychological Examination and Report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) Determination and Disposition.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) Discharge.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

"(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

"(f) Revocation of Conditional Discharge.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"(g) Release to State of Certain Other Persons.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

"§ 4247. General Provisions for Chapter

"(a) Definitions.—As used in this chapter—

"(1) 'rehabilitation program' includes—

"(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

"(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

"(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

"(D) organized physical sports and recreation programs; and

"(2) 'suitable facility' means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

"(b) Psychiatric or Psychological Examination.—A psychiatric or psychological examination ordered pursuant to this chapter or section 3552(c) shall be conducted by a licensed or certified psychiatrist or clinical psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be—

"(1) designated by the court if the examination is ordered under section 3552(c), 4241, 4242, 4243, or 4244; or

"(2) designated by the court, and upon the request of the defendant, an additional examiner may be selected by the defendant, if the examination is ordered under section 4245 or 4246.

For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The Director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

"(c) Psychiatric or Psychological Reports.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the government, and shall include—

"(1) the person's history and present symptoms;

"(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

"(3) the examiner's findings; and

"(4) the examiner's opinions as to diagnosis, prognosis, and—

"(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him metally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

"(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

"(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

"(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

"(E) if the examination is ordered under section 3552(c), any recommendation the examiner may have as to application to the defendant of sentencing guidelines and policy statements relating to the mental condition of the defendant and as to how that mental condition should affect the sentence.

"(d) Hearing.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) Periodic Report and Information Requirements.—(1) The director of the facility in which a person is hospitalized pursuant to—

"(A) section 4241 shall prepare semiannual reports; or

"(B) sections 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

"(2) The director of the facility in which a person is hospitalized pursuant to sections 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

"(f) Videotape Record.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

"(g) Admissibility of a Defendant's Statement at Trial.—A statement made by the defendant during the course of a psychiatric or psychological examination pursuant to sections 4241 or 4242 is not admissible as evidence against the accused on the issue of guilt or punishment in any criminal proceeding, unless the defendant waived his privilege against self incrimination, but is admissible on the issue whether the defendant suffers from a mental disease or defect.

"(h) Habeas Corpus Unimpaired.—Nothing contained in sections 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of hebeas corpus the illegality of his detention.

"(i) Discharge.—Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of sections 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the government.

"(j) Authority and Responsibility of the Attorney General.—The Attorney General—

"(A) may contract with a State, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

"(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

"(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

"(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

"(k) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.".

(b) The item relating to chapter 313 in the chapter analysis of Part III of title 18, United States Code, is amended to read as follows:

"313. Offenders with mental disease or defect.".

Sec. 702. Rule 12.2 of the Federal Rules of Criminal Procedure is amended—

(a) by deleting "crime" in subdivision (a) and inserting in lieu thereof "offense";

(b) by deleting "mental state" in subdivision (b) and inserting in lieu thereof "state of mind";

(c) by deleting "by a psychiatrist designated for this purpose in the order of the court" in subdivision (c) and inserting in lieu thereof "pursuant to 18 U.S.C. 4242; and

(d) by deleting "mental state" in subdivision (d) and inserting in lieu thereof "state of mind".

Sec. 703. Section 3006A of title 18, United States Code, is amended—

(a) in subsection (a), by deleting "or, (4)" and substituting "(4) whose mental condition is the subject of a hearing pursuant to chapter 313 of this title, or (5)"; and

(b) in subsection (g), by deleting "or section 4245 of title 18".

TITLE VIII—SURPLUS FEDERAL PROPERTY AMENDMENTS

Sec. 801. Section 203 of the Federal Property and Administrative Services Act of 1949 as amended (40 U.S.C. 484), is further amended by adding at the end thereof the following new subsection:

"(p)(1) Under such regulations as he may prescribe, the Administrator is authorized in his discretion to transfer or convey to the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, or any political subdivision or instrumentality thereof, surplus property determined by the Attorney General to be required for correctional facility use by the authorized transferee or grantee under an appropriate program or project for the care or rehabilitation of criminal offenders as approved by the Attorney General. Transfers or conveyance under this authority shall be made by the Administrator without monetary consideration to the United States.

"(2) The deed of conveyance of any surplus real property disposed of under the provisions of this subsection—

"(A) shall provide that all such property shall be used and maintained for the purpose for which it was conveyed in perpetuity, and that in the event the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the United States, revert to the United States; and

"(B) may contain such additional terms, reservations, restrictions, and conditions as may be determined by the Administrator to be necessary to safeguard the interests of the United States.

"(3) With respect to surplus real property conveyed pursuant to this subsection, the Administrator is authorized and directed—

"(A) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained in any instrument by which such transfer was made;

"(B) to reform, correct, or amend any such instrument by the execution of a corrective reformative or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

"(C) to (i) grant releases from any of the terms, conditions, reservations, and restrictions contained in, and (ii) convey, quitclaim, or release to the transferee or other eligible user any right or interest reserved to the United States by any instrument by which such transfer was made, if he determines that the property so transferred no longer serves the purpose for which it was transferred, or that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: *Provided*, That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he or she shall deem necessary to protect or advance the interests of the United States.".

SEC. 802. THE FIRST SENTENCE OF SUBSECTION (O) OF SECTION 203 OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, AS AMENDED (40 U.S.C. 484(O)), IS FURTHER AMENDED BY REVISING THE FIRST SENTENCE OF SUCH SUBSECTION TO READ AS FOLLOWS:

"(o) The Administrator with respect to personal property donated under subsection (j) of this section and with respect to personal or real property transferred or conveyanced under subsection (p) of this section, and the head of each executive agency disposing of real property under subsection (k) of this section, shall submit during the calendar quarter following the close of each fiscal year a report to the Senate (or to the Secretary of the Senate if the Senate is not in session) and to the House of Representatives (or to the Clerk of the House if the House is not in session) showing the acquisition cost of all personal property so donated and of all real property so disposed of during the preceding fiscal year.".

TITLE IX—MISCELLANEOUS CRIMINAL JUSTICE IMPROVEMENTS

PART A

SEC. 901. (a) Chapter 95 of title 18, United States Code, is amended by adding new sections 1952A and 1952B, following section 1952, as follows:

"§ 1952A. Use of interstate commerce facilities in the commission of murder-for-hire

"(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of anything of pecuniary value or for a promise to pay anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than five years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or by life imprisonment, or shall be fined not more than $50,000, or both.

"(b) As used in this section—

"(1) 'anything of pecuniary value' means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; and

"(2) 'facility of interstate commerce' includes means of transportation and communication.".

"§1952B. Violent crimes in aid of racketeering activity

"(a) Whoever, as consideration for the receipt of or as consideration for a promise or agreement to pay anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

"(1) for murder or kidnapping, by imprisonment for any term of years or for life or a fine of not more than $50,000, or both;

"(2) for maiming, by imprisonment for not more than thirty years or a fine of not more than $30,000, or both;

"(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine of not more than $20,000, or both;

"(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine of not more than $5,000, or both;

"(5) for attempting or conspiring to commit murder, by imprisonment for not more than ten years or a fine of not more than $10,000, or both; and

"(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of not more than $3,000, or both.

"(b) As used in this section—

"(1) 'racketeering activity' has the meaning set forth in section 1961 of this title; and

"(2) 'enterprise' includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.".

(b) The analysis at the beginning of the chapter is amended by adding after the item relating to section 1952 the following:

"1952A. Use of interstate commerce facilities in the commission of murder-for-hire.
"1952B. Violent crimes in aid of racketeering activity.".

PART B

SEC. 902. The Tariff Act of 1930 (19 U.S.C. 1202 et seq.) is amended as follows:

(a) Section 607 (19 U.S.C. 1607) is amended by—

(1) striking out "$10,000" in the caption and in the first place it appears in the text and inserting in lieu thereof "100,000"; and

(2) striking out the last sentence and inserting in lieu thereof the following: "For purposes of this section and section 610 of this Act, merchandise the importation of which is prohibited shall be held not to exceed $100,000 in value. For purposes of section 612 of this Act, merchandise the importation of which is prohibited shall be held not to exceed $10,000.".

(b) Section 608 (19 U.S.C. 1608) is amended by adding "or of ten percent of the appraised value of the articles so claimed, whichever is greater" after "of $250".

(c) Section 610 (19 U.S.C. 1610) is amended by striking out "$10,000" each place it appears in the caption and text and inserting in lieu thereof "$100,000".

PART C

SEC. 903. Section 844 of title 18 of the United States Code is amended as follows:

(1) In subsection (f), following the words "by means of an explosive", insert "or fire".

(2) In subsection (i), following the words "by means of an explosive" insert "or fire".

PART D

SEC. 904. Section 2510 of title 18 of the United States Code is amended—

(1) in paragraph (10), by striking out "and" at the end thereof;

(2) in paragraph (11), by striking out the period at the end thereof and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following:

"(12) 'surreptitious entry' means a physical entry upon a private place or premises to install, repair, reposition, replace, or remove any electronic, mechanical, or other device, and includes both covert entry and entry effected by means of a ruse or subterfuge.".

SEC. 905. Section 2518(1) of that title is amended—

(1) in paragraph (e), by striking out "and" at the end thereof;

(2) in paragraph (f), by striking out the period at the end thereof and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following:

"(g) a statement whether surreptitious entries are required to carry out the order.".

SEC. 906. Section 2518(4) of that title is amended—

(1) in paragraph (d), by striking out the "and" at the end thereof;

(2) in paragraph (e), by striking out the period at the end thereof and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following:

"(f) whether surreptitious entries are authorized or approved to carry out the order, and, if such entries are authorized or approved, the identity of the agency authorized to make the surreptitious entries.".

SEC. 907. Section 2518(7) of that title is amended—

(1) by amending paragraph (a) to read as follows:

"(a) an emergency situation exists that involves—

"(i) immediate danger of death or serious physical injury to any person, "(ii) conspiratorial activities threatening the national security interest, or

"(iii) conspiratorial activities characteristic of organized crime,

that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and"; and

(2) by inserting a comma and "and may make any surreptitious entry required to effect such interception," immediately before "if an application for an order".

Sec. 908. Section 2519(1) of that title is amended—

(1) by inserting immediately after paragraph (e) the following:

"(f) the fact that surreptitious entries to carry out the order were authorized or approved;"; and

(2) by redesignating paragraphs (f) and (g) as paragraphs (g) and (h), respectively.

Sec. 909. Section 2519(2) of that title is amended in paragraph (a) by striking out "(g)" and by inserting in lieu thereof "(h)".

Part E

Sec. 910. Section 5031 of title 18 of the United States Code is amended by striking the word "eighteenth" both places it appears and inserting in lieu thereof the word "seventeenth".

Sec. 911. Section 5032 of title 18 of the United States Code is amended—

(1) by striking out the word "or" preceding "(2)" in the first paragraph;

(2) by striking the period at the end of the first paragraph and inserting in lieu thereof ", or (3) that the offense charged is a felony and that there is a substantial federal interest in the case or the offense to warrant the exercise of federal jurisdiction."; and

(3) in the fourth paragraph, by striking "punishable by a maximum penalty of ten years imprisonment or more, life imprisonment or death," and insert in lieu thereof "that is a crime of violence or an offense described in sections 841, 952(a), 955, or 959 of title 21,"; and in the same paragraph, strike out "sixteen" and "sixteenth" and insert in lieu thereof "fourteen" and "fourteenth", respectively.

Sec. 912. Section 5038 of title 18 of the United States Code is amended by striking subsection (d) and inserting in lieu thereof the following:

"(d) Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding.".

Part F

Sec. 913. Section 1201 of title 18 of the United States Code is amended—

(1) in subsection (a)(3), by deleting "or" at the end thereof;

(2) in subsection (a)(4), by deleting the comma at the end thereof and substituting "; or"; and

(3) by adding after subsection (a)(4) a new subsection (a)(5) to read as follows:

"(5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of his official duties,".

Part G

Sec. 914. Chapter 7 of title 18 of the United States Code is amended by adding a new section at the end thereof to read as follows:

"§ 115. Influencing, impeding, or retaliating against a federal official by threatening or injuring a family member

"(a) Whoever assaults, kidnaps, or murders, or attempts to kidnap or murder, or threatens to assault, kidnap or murder a member of the immediate family of a United States official, United States judge, or federal law enforcement officer, with intent to impede, intimidate, interfere with, or retaliate against such official, judge or law enforcement officer while he is engaged in or on account of the performance of his official duties, shall be punished as provided in subsection (b).

"(b)(1) An assault in violation of this section shall be punished as provided in section 111 of this title;

"(2) a kidnapping or attempted kidnapping in violation of this section shall be punished as provided in section 1201 of this title;

"(3) a murder or attempted murder in violation of this section shall be punished as provided in sections 1111 and 1113 of this title;

"(4) a threat made in violation of this title shall be punished by a fine of not more than $5,000 or imprisonment for a term of not more than five years, or both, except that imprisonment for a threatened assault shall not exceed three years.

"(c) As used in this section, the term—

"(1) 'federal law enforcement officer' means any officer, agent, or employee of the United States authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of federal criminal law;

"(2) 'immediate family member' of an individual means—

"(A) his spouse, parent, brother or sister, child, or person to whom he stands in loco parentis; or

"(B) any other person living in his household and related to him by blood or marriage;

"(3) 'United States judge' means any judicial officer of the United States, and includes a justice of the Supreme Court and a United States magistrate; and

"(4) 'United States official' means the President, President-elect, Vice President, Vice President-elect, a member of Congress, a member-elect of Congress, a member of the executive branch who is the head of a department listed in 5 U.S.C. 101, or the Director of Central Intelligence.".

Part H

Sec. 915. Section 31 of title 18 of the United States Code is amended in the definition of "motor vehicle" by striking out "or passengers and property;" and inserting in lieu thereof "passengers and property, or property or cargo;".

Part I

Sec. 916. (a) Section 207(a) of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1056(a)) is amended by striking out "a civil penalty not exceeding $1,000" and inserting in lieu thereof "a civil penalty not exceeding $10,000".

(b) Section 209 of such Act (31 U.S.C. 1058) is amended by striking out "$1,000, or imprisonment not more than one year, or both" and inserting in lieu thereof "$50,000, or imprisonment not more than five years, or both".

(c) Section 231(a) of such Act (31 U.S.C. 1101(a)) is amended—

(1) by inserting ", or attempts to transport or cause to be transported," after "transports or causes to be transported" in paragraph (1); and

(2) by striking out "in an amount exceeding $5,000" and inserting in lieu thereof "in an amount exceeding $10,000".

"(d) Section 235 of such Act (31 U.S.C. 1105) is amended—

(1) by redesignating subsection (b) as subsection (c); and

(2) by inserting the following new subsection after subsection (a):

"(b) A customs officer may stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of section 231.".

"(e)(1) Chapter 1 of such Act is amended by adding the following new section at the end thereof:

"§ 214. Rewards for Informants

"(a) The Secretary may pay a reward to an individual who provides original information which leads to a recovery of a criminal fine, civil penalty, or forfeiture, which exceeds $50,000, for a violation of this title.

"(b) The Secretary shall determine the amount of a reward under this section. The Secretary may not award more than 25 per centum of the net amount of the fine, penalty, or forfeiture collected or $250,000, whichever is less.

"(c) An officer or employee of the United States, a State, or a local government who provides information described in subsection (a) in the performance of official duties is not eligible for a reward under this section.

"(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.".

(2) The table of contents of such chapter is amended by adding the following new item after the item relating to section 213:

"214. Rewards for informants.".

Sec. 917. Section 1961(1) of title 18, United States Code, is amended—

(1) by striking out "or" after "(relating to embezzlement from union funds),"; and

(2) by inserting before the semicolon at the end thereof the following: ", or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act".

Part J

Sec. 918. (a) Chapter 103 of title 18 of the United States Code is amended by adding at the end thereof a new section as follows:

"§ 2118. Robbery of a Pharmacy

"(a) Whoever takes property from a pharmacy or a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822) by force or violence, or by intimidation, shall be imprisoned for not more than ten years, or fined not more than $5,000, or both.

"(b) For purposes of this section, the term 'property' means a controlled substance, consisting of a narcotic, amphetamine, or barbiturate that is listed in Schedules I through IV established by section 202 of the Controlled Substances Act (21 U.S.C. 812).".

(b) The analysis for chapter 103 of title 18 of the United States Code is amended by adding at the end thereof the following:

"2118. Robbery of a pharmacy.".

Part K

Sec. 919. (a) Chapter 19 of title 18 of the United States Code is amended by adding at the end thereof the following new section:

"§ 373. Solicitation to Commit Crime of Violence

"(a) Offense.—Whoever, with intent that another person engage in conduct constituting a federal crime of violence, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by death, shall be imprisoned for not more than twenty years.

"(b) Affirmative Defense.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not 'voluntary and complete' if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

"(c) Defense Precluded.—It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for the commission of the crime, because he was incompetent or irresponsible, or because he is immune from prosecution or otherwise not subject to prosecution.".

(b) Chapter 1 of title 18 of the United States Code is amended by adding at the end thereof a new section as follows:

"§ 16. Crime of Violence Defined

"Except as otherwise expressly provided, as used in this title 'crime of violence' means—

"(1) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or

"(2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.".

Part L

Sec. 920. Section 1111 of title 18 of the United States Code is amended by adding after the word "arson" the words "escape, murder, kidnapping, treason, espionage, sabotage,".

Part M

Sec. 921(a). Whereas the problem of drug abuse continues to worsen in most parts of the world;

Whereas the number of drug abusers has risen and abuse has spread geographically;

Whereas the number, variety, and potency of illicitly used narcotics, drugs, and pyschotropic substances have increased;

Whereas illicit production has expanded and trafficking flourishes; and

Whereas a declaration by the United Nations of an International Year Against Drug Abuse would serve as a catalyst for interest and action at all international levels involving families, communities, neighborhoods, schools, religious institutions, and public, private, and voluntary associations: Now, therefore, be it

Resolved, That it is the sense of the Congress that the President is urged to promote a declaration by the United Nations of an International Year Against Drug Abuse.

(b) The Secretary of the Senate shall transmit copies of this resolution to the President.

Part N

Sec. 922(a) Part D of the Controlled Substances Act is amended by adding after section 405 the following new section.

"DISTRIBUTION IN OR NEAR SCHOOLS

"Sec. 405A. (a) Any person who violates section 401(a)(1) by distributing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school is (except as provided in subsection (b)) punishable (1) by a term of imprisonment, or fine, or both up to twice that authorized by section 841(b) of this title and (2) at least twice any special parole term authorized by section 401(b) for a first offense involving the same controlled substance and schedule.

"(b) Any person who violates section 401(a)(1) by distributing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school after a prior conviction or convictions under subsection (a) have become final is punishable (1) by a term of imprisonment of not less than three years and not more than twenty years and (2) at least three times any special term authorized by section 401(b) for a second or subsequent offense involving the same controlled substance and schedule.

"(c) In the case of any sentence imposed under subsection (b) imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under subsection (b) shall not be eligible for parole under section 4202 of title 18 of the United States Code until the individual has served the minimum sentence required by such subsection."

(b) Section 401(b) of such Act (21 U.S.C. 841(b)) is amended by inserting "or 405A" after "405".

(c) Section 401(c) of such Act is amended by inserting "or 405A" after "405" each place it occurs.

(d) Section 405 of such Act (21 U.S.C. 845) is amended by striking out "Any" in subsections (a) and (b) and inserting in lieu thereof "Except as provided in section 405A, any".

Part O

Sec. 923. Notwithstanding any other provision of this Act, all contracts entered into pursuant to the authority granted in this Act shall be effective for any fiscal year only to such an extent or in such amounts as are provided in appropriation Acts.

II

97TH CONGRESS
2D SESSION

S. 2658

To amend title 18 to delimit the insanity defense and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 22 (legislative day, JUNE 8), 1982

Mr. SPECTER (for himself and Mr. RUDMAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18 to delimit the insanity defense and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following:

§ 16. Insanity defense

(a) It shall be an affirmative defense to a prosecution under any Federal statute that the defendant, as a result of a mental disease, did not know the nature and quality of his actions or did not know the wrongfulness of his actions at the time he committed the acts otherwise constituting the offense.

(b) The defendant has the burden of proving by clear and convincing evidence the defense of insanity.

(c) Expert witnesses shall not be permitted to offer opinions on the ultimate legal issues presented to the trier of fact.

○

Senator **Specter**. Before proceeding to the jurors, we have present two Senators who have introduced legislation on the subject. Before hearing from them, I would call upon my colleague, Senator Metzenbaum, for any questions.

Senator **Metzenbaum**. Thank you, no questions.

Senator **Specter**. Senator Pressler has another engagement, so we will hear first from Senator Pressler on the subject generally and perhaps more particularly on S. 2669, which Senator Pressler has introduced. Welcome, Senator.

First, without objection, we will insert prepared remarks from Senator Hatch.

[The prepared statement of Senator Hatch and the texts of S. 818 and S. 1558 follow:]

PREPARED STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The public outcry for the implementation of an appropriate alternative to the existing form of the insanity defense has augmented to a plaintive cry for change now in the wake of extensive media coverage of notorious crimes, such as that of John W. Hinckley, Jr., which serve as examples of the inadequacies of the existing law in this area. Few aspects of the criminal law, in recent memory, have stimulated as much debate and criticism as has the use of the insanity defense. Perhaps it would be more accurate to cite not the use but the abuse of this defense, as its application has been broadened beyond all comprehension, as the source of the controversy. Even at the time of its introduction as a formal principle in the Anglo Saxon Jurisprudential system, the concept was extremely polemical.

The insanity defense emerged as a means by which English jurists could avoid—in a legally rational manner—condemning a convicted felon to death who was so obviously mentally deranged that his execution would affront ordinary moral sensibilities. The traditional concept of the defense, however, has become a legal anachronism, ill-suited to the needs of society, as the nature of the criminal justice system and psychiatric care has changed.

A number of factors have intervened to render this socially expedient enterprise obsolete. First, no longer may acquittees be placed indefinitely in a facility for the criminally insane. They must be treated comparably to a civilly committed patient. Secondly, our psychiatric hospitals are no longer warehouses for prolonged storage of socially unacceptable deviates. Thirdly, a loosening of the insanity defense and tightening of civil commitment standards have resulted in the placement within our psychiatric hospitals of some individuals acquitted of bizarre sociopathic activities who cannot be "treated"; and yet must and should be confined for the protection of society. Finally, standards for release of acquittees require a psychiatric prediction of continuing dangerousness, a feat that is, at best, chimerical. (William A. Carnahan, Changing the Insanity Defense, p. 134).

Proponents of the insanity defense argue that there is no need to change the existing insanity defense laws, because criminal defendants plead insanity in only a small fraction of the cases around the country, but the number of such cases has been growing rapidly. In addition, the insanity defense, once invoked almost exclusively in cases where the defendant was charged with murder, is now being used in trials for "less serious" offenses with increasing frequency. The most tragic example of this extension is surely the use of the insanity defense in cases of rape and child abuse, where repeated acquittal may be gained on grounds of insanity, for offenses which are generally held as crimes having high rates of recidivism and low rates of success in the ability to "treat" and "cure" those known to have a tendency to commit these offenses.

Public indignation over the existing insanity defense laws has been piqued by exposure to several sensationalized trials in which the insanity defense has been employed. Among these was the so-called "Twinkie Defense" of Dan White, former city supervisor of the City of San Francisco, who went on trial for fatally shooting Mayor George Moscone and Supervisory Harvey Milk, in the heat of a dispute. Through a creative manipulation of the "diminished capacity" defense, White's attorney presented a group of "expert" witnesses, such as Dr. Martin Blinder, a psychiatrist who testified in White's behalf, who told the jury that White had been depressed before the crime and had been eating junk food, which lead to further depression and more junk food, and the sugar made White violent. (Excerpts from articles by Carol Gallo, Criminal Justice Report, October 1981, The Insanity Defense). White's efforts were successful in persuading the jury to accept this defense.

This approach to the use of the insanity defense is obviously far afield from the original intent of the concept of an insanity defense, yet it is indicative of the type of aberrations of the concept which may occur under existing law.

The foundation for the present defense was first laid in the *M'Naghten* case. (8 Eng. Rep. 718 (House of Lords 1843)). The so-called *M'Naghten* Rule which emerged from this case created the basis for a cognitive test of insanity:

> To establish a defense on the ground of insanity, it must be clearly approved that, at the time of the committing of the act, the party accused was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, he did not know he was doing what was wrong.

The so-called "right-wrong" test of insanity posited in M'Naghten has gradually, but steadily, been broadened over the years.

The *M'Naghten* test later was supplemented by a volitional test which came to be known as the "irresistible impulse" standard. Under this standard, a person who could discern right from wrong, yet who, for reason of mental disease, could not control his actions could avail himself to the insanity defense. (see *Davis* v. *United States,* 165 U.S. 373 (1897).).

The next major redefinition of the insanity defense occurred in 1954 with the decision set down by Judge David L Bazelon, in the Durham trial, in the U.S. Circuit Court of Appeals for the District of Columbia. In that case, the court held that—

> An accused is not criminally responsible if the unlawful act was the product of mental disease or defect.

After nearly two decades of attempting to interpert the provisions of this rule, without agreement being reached as to its meaning, the District of Columbia court in 1972 adopted a formulation, that had previously been adopted by other circuits, developed by the American Law Institute. The American Law Institute's model penal code (section 4.01 Proposed Official Draft 1962) stated that:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he lacks the substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of the law.
>
> (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

It is this language that today serves as direction for the use of the insanity defense in the federal courts. This is an important recognition to make in light of the Hinckley case.

This is a particularly significant case in terms of the application of the insanity defense. Because of the very public nature of the original crime, a great deal of misunderstanding has occurred in the public sector over the very technical aspects of the Hinckley defense strategy, This case is a prime example of the gross abuses which can occur under the existing system. This case in particular bears the potential of seriously eroding any remaining public trust in the the ability of our courts to adequately deal with the increase in violent crime in this nation. The preception which arises from the spectre of the Hinckley acquittal on the basis of an insanity plea is one of an emasculated judiciary which cannot even convict a man for a crime that several million people witnessed.

Unfortunately, the Hinckley incident was not the only assassi-nation attempt which was made during 1981. The world was shocked to see three world leaders fall in close succession in that time: Pope John Paul, II; President Anwar Sadat; and President Reagan. The disparity in the adjudication process of these case damages the public preception of the ability of our criminal justice system even further. It took ten weeks for Italian officials to identify, locate, try, and sentence the men who gunned down the Pontif; Egyptial authorities required only five months to identify, try, and sentence those involved in the complicated plot to assassinate President Sadat. However, John W. Hinckley, Jr. a man who was captured on film in his attempt to assassinate the President and three others, has been found "not guilty by reason of insanity", after a trial which took too great a toll on the people of this nation and their belief in its system of justice to even be estimated. The American people are now asked to accept the fact that the admitted would-be assassin of the President could go free after a mere 50 days of psychiatric evaluation, totally absolved of all responsibility for his crime. The Hinckley trial was typical of trials in which the insanity defense is attempted, taking on every semblance of a jurdicial circus, as a battallion of "expert" witnesses on either side present a surfeit of conflicting, technical data to the baffled jury members. The Hinckley case, more than any other single case in recent memory, has served as an excellent illustration of the exigent need to develop an alternative to the existing insanity defense laws.

Generations of legal scholars and laymen alike have sought to define the circumstances under which mentally abnormal offenders should have assess to an insanity defense, without significant progress. The complexity of modern psychological theory does not easily lend itself to the standard of proof required in judicial proceedings. Due to the plethora of conflicting theories and treatment methods which comprise the science of psychology as we know it, trials in which the insanity defense is raised often degenerate into heated debates where defense and prosecution "expert" witnesses provide the court with opposing interpretations of the same facts, symptoms, and observations. Chief Justice Burger, while still a Circuit Judge, said of this phenomenon, "no rule of law can possibly be sound or workable which is dependent on the terms of another discipline whose members are in profound disagreement about what those terms mean. (*Campbell* v. *United States,* 307 F. 2d 597, 612 (D.C. Cir 1962). All this serves to further complicate the already complex task of the judge and the jury of ascertaining the guilt or innocence of the accused. The only means of adequately solving the inequities of the existing remedy is to establish a feasible yet fair alternative.

I have devoted a great deal of time to developing just such an alternative, which has been realized in S. 2572. The proposal that I have developed addresses both the problems of better serving the needs of the criminally insane, so that they may receive the best possible treatment available, while recognizing the government's continuing obligation to protect the public's interests. This bill continues to recognize the obligation to treat rather than punish, the mentally ill. The major modifications to the existing law proposed by this bill are: (1) an extension of the government's authority to gain access to information pertaining to the patient's progress when a petition for release has been made; (2) establishing a participatory role for the government and the courts in making the final determination of the appropriate time to release an incarcerated patient; (3) a semantic change in the language of the verdict recognizing the accused's role as perpetrator of the crime in question: (4) using the more clearly understood mens rea test to establish eligibility for the use of a plea of insanity. The wording change of the verdict proposed by this bill would reflect changes made by the great states of: Illinois, Indiana, Michigan, and New Mexico.

As the nature and quality of the law and psychiatric treatment have progressed, the insanity defense available to mentally ill offenders has merely been broadened to extend to an ever-growing number and variety of offenders. The extension of the concept has been perpetrated by the ingenuity of the legal profession to develop additional avenues toward victories, not in the interest of gaining the advantageous means of treatment for truly sick clients. The abuses which have occurred as a result of the use of too complex and general a defense has led to a growing mistrust and disrespect for our criminal justice system by the public. This bill seeks to renew that public trust while continuing to honor the government's obligation to treat mentally ill offenders, rather than punish them for offenses which they have committed. This bill would increase the government's ability to protect the public and the individual patient from the consequences of administrative expediency in the implementation of treatment for the criminally insane.

X

97TH CONGRESS
1ST SESSION

S. 818

To amend title 18 to limit the insanity defense.

IN THE SENATE OF THE UNITED STATES

MARCH 26 (legislative day, FEBRUARY 16), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18 to limit the insanity defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§16. Insanity defense

"(a) It shall be a defense to a prosecution under any Federal statute, that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.

"(b) This section applies to prosecutions under any Act of Congress other than—

"(1) an Act of Congress applicable exclusively in the District of Columbia;

"(2) the Canal Zone Code; or

"(3) the Uniform Code of Military Justice (10 U.S.C. 801 et seq.).".

(b) The table of sections from chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"16. Insanity defense."

○

II

97TH CONGRESS
1ST SESSION

S. 1558

To amend title 18 to limit the insanity defense and to establish a verdict of not guilty only by reason of insanity.

IN THE SENATE OF THE UNITED STATES

JULY 31 (legislative day, JULY 8), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18 to limit the insanity defense and to establish a verdict of not guilty only by reason of insanity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 16. Insanity defense

"(a) STATE OF MIND.—It shall be a defense to a prosecution under any Federal statute, that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.

"(b) APPLICATION OF THIS SECTION.—This section applies to prosecutions under any Act of Congress other than—

"(1) an Act of Congress applicable exclusively in the District of Columbia;

"(2) the Canal Zone Code; or

"(3) the Uniform Code of Military Justice (10 U.S.C. 801 et seq.).

"§ 17. Determination of the existence of insanity at the time of the offense

"(a) MOTION FOR PRETRIAL PSYCHIATRIC EXAMINATION.—Upon the filing of a notice, as provided in rule 12.2 of the Federal Rules of Criminal Procedure, the court, upon motion of the attorney for the Government, may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court pursuant to the provisions of section 20 (b) and (c).

"(b) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in rule 12.2 of the Federal Rules of Criminal Procedure on a motion by the defendant or by the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty only by reason of insanity.

"§ 18. Hospitalization of a person acquitted by reason of insanity

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (d) of this section. The court shall order a hearing to determine whether the person is currently suffering from a mental disease or defect and that his release would create a significant risk of bodily injury to another person or serious damage to property of another.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court shall order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 20 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 20(d), and shall be conducted not later than forty days after the date of the finding of guilty only by reason of insanity.

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the acquitted person is currently suffering from a mental disease or defect and that his release would create a significant risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release would not create a significant risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE FROM SUITABLE FACILITY.—When the director of a facility determines that an acquitted person, hospitalized pursuant to subsection (d), has recovered from his mental disease or defect to such an extent that his release would no longer create a significant risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to such person's counsel and to the attorney for the Government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 20(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of evidence that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a significant risk of bodily injury to another person or serious damage to property of another, the court shall order his immediate discharge.

"§ 19. Hospitalization of a convicted person suffering from mental disease or defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF CONVICTED DEFENDANT.—A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant. Such motion must be supported by substantial information indicating that the defendant may currently be suffering from a mental disease or defect and that he is in need of custody for care or treatment in a suitable facility for such disease or defect. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order a hearing on its own motion if the court deems that there is reasonable cause to believe that the defendant may currently be suffering from a mental disease or defect and that he is in need of custody for care or treatment in a suitable facility.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 20 (b) and (c). In addition to the information required to be included in the psychiatric report pursuant to the provisions of section 20(c), if the report includes an opinion by the examiners that the defendant is currently suffering from a mental disease or defect but that such disease or defect does not require his custody for care or treatment, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best provide the defendant with the kind of treatment needed.

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 20(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to probation or imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence to the maximum term authorized by law for the offense of which the defendant was found guilty.

"(e) DISCHARGE FROM SUITABLE FACILITY.—When the director of the facility determines that the defendant, hospitalized pursuant to subsection (d), has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing, and may modify the provisional sentence.

"§ 20. General provisions

"(a) DEFINITIONS.—As used in this title—

"(1) 'insanity' means a mental disease or defect of a nature constituting a defense to a Federal criminal prosecution; and

"(2) 'suitable facility' means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

"(b) PSYCHIATRIC EXAMINATION.—A psychiatric examination ordered pursuant to this title shall be conducted by a licensed or certified psychiatrist, or a clinical psychologist and a medical doctor, or, if the court finds it appropriate, by additional examiners. Each examiner shall be designated by the court if the examination is ordered under section 17, 18, or 19. For the purposes of an examination pursuant to an order under section 19, the court may commit the person for a reasonable period not exceeding thirty days, in order to conduct such examination, or pursuant to section 17 or 18, the court may commit such person to the custody of the Attorney General for placement in a suitable facility for a reasonable period, but not to exceed forty days. Unless impracticable, the psychiatric examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension not exceeding fifteen days under section 19, or not exceeding twenty days under section 17 or 18, upon a showing of good cause that additional time is necessary to observe and evaluate the defendant.

"(c) PSYCHIATRIC REPORTS.—A psychiatric report ordered pursuant to this title shall be prepared by the examiner designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

"(1) the person's history and present symptoms;

"(2) a description of the psychological and medical tests employed and their results;

"(3) the examiner's findings; and

"(4) the examiner's opinions as to diagnosis, prognosis, and—

"(A) if the examination is ordered under section 17, whether the person was insane at the time of the offense charged;

"(B) if the examination is ordered under section 18, whether the person is currently suffering or in the reasonable future is likely to suffer from a mental disease or defect which would create a significant risk of bodily injury to another person or serious damage to property of another; or

"(C) if the examination is ordered under section 19, whether the person is currently suffering or in the reasonable future is likely to suffer from a mental disease or defect for which he is in need of custody in a suitable facility for care or treatment.

"(d) HEARING.—At a hearing ordered pursuant to this title the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to law. The person shall be afforded an opportunity to testify, to present evidence, to subpena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS FOR SUITABLE FACILITIES.—(1) The director of the facility in which a person is hospitalized pursuant to section 18 or 19, shall prepare annual reports concerning the mental condition of such person, and shall make recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility, and copies of the reports shall be submitted to such other persons as the court may direct.

"(2) The director of the facility in which a person is hospitalized pursuant to section 18, 19, or 20, shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

"(f) ADMISSIBILITY OF A DEFENDANT'S STATEMENT AT TRIAL.—A statement made by the defendant during the course of a psychiatric examination pursuant to section 17 is not admissible as evidence against the accused on the issue of guilt in any criminal proceeding, but is admissible on the issue of whether or not the defendant suffers from a mental disease or defect.

"(g) HABEAS CORPUS UNIMPAIRED.—Nothing contained in section 18 precludes a person who is committed under such section from establishing by writ of habeas corpus the illegality of his detention.

"(h) DISCHARGE FROM SUITABLE FACILITY.—Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsections (e) of either section 18 or 19, counsel for the person or his legal guardian may, during such person's hospitalization, file a motion with the court ordering such commitment for a hearing to determine whether the person should be discharged from such facility. Such motion may be filed at any time except that no such motion may be filed within one hundred and eighty days after a court determines that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

"(i) Authority and Responsibility of the Attorney General.—(1) Before a person is placed in a suitable facility pursuant to section 18 or 19, the Attorney General shall request the director of each facility under consideration to furnish information describing rehabilitation programs that would be available to such person, and, in making a decision as to the placement of such person, shall consider the extent to which the available programs would meet the needs of such person.

"(2) The Attorney General may contract with a State, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this title.".

(b) The table of sections for chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following:

"16. Insanity defense.
"17. Determination of the existence of insanity at the time of the offense.
"18. Hospitalization of a person acquitted by reason of insanity.
"19. Hospitalization of a convicted person suffering from mental disease or defect.
"20. General provisions.".

○

STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator PRESSLER. Thank you, Mr. Chairman and members of the committee. I shall be very brief.

Yesterday I introduced S. 2669, to amend title 18 to limit the defense of insanity. Let me say that I want to applaud the subcommittee for holding this hearing. I think that we need to review this issue closely. I have joined as a cosponsor of the Hatch bills which would limit the insanity defense and have joined Senator Thurmond and 52 other Members of the Senate who support S. 2572, the Violent Crime and Drug Enforcement Act of 1982.

I am also aware that my distinguished collegues, Senator Specter and Senator Zorinsky have introduced bills to make reforms in this area.

My bill is very similar to the Hatch bills with regard to the premeditation issue. It provides that the insanity defense is available only if the defendant lacked the requisite state of mind. S. 2669 differs in the sense that it would require a mandatory period of confinement. Thus, if one opted to use the insanity defense regarding the offenses of murder and attempted murder, one would be required to serve a mandatory period of confinement in a mental institution. If the court later found the defendant no longer in need of custody for care or treatment, the court could order the defendant to serve the remainder of the provisional sentence in prison.

Let me say, Mr. Chairman, that there is a great deal of discussion about this in view of the *Hinckley* case. I do not think that we should act in the heat of passion, but the *Hinckley* case illustrates a lot of things that are wrong with our judicial system. There is a growing wave of protest that criminals are getting off on technicalities. This particular case seems to bring together all the frustrations people have about this issue.

Let me also say that the insanity defense is a millionaire's defense or a rich man's defense. Unless one is a cause celebre, there is almost no hope of a middle-income person or a poor person marshaling the type of psychiatric testimony that would be necessary to sustain such an action.

When I was a student in law school, I had the privilege of writing a paper tracing the insanity defense from the *M'Naghten* rule through the *Durham* rule delivered by Judge Bazelon of the U.S. Court of Appeals for the District of Columbia. The development of that rule originally was intended to deal with someone who was truly insane and incapable of judging his acts. However, as we moved into the sixties and seventies, temporary insanity came to the forefront and teams of psychiatrists began debating a person's changing mental state. We have now reached a point where the public is crying out for change.

With regard to the jurors let me say that we must remember that it is not the jurors fault. They were instructed in the law by the judge. The instructions in this case were very complicated. What a jury can decide in such a case is actually very narrow. The jury does not sit down and decide the whole thing. They have two or three options available to them. They have very specific instructions in law which really limit what they as a jury can do. While some people are blaming the jury, I place the blame on the laws.

I do not think the public realizes how limited the jury's options are in such a case. It is up to us to change the law.

Mr. Chairman, I thank you very much for this opportunity to testify. I am going to submit to the subcommittee a copy of my testimony and a copy of my bill. I do not wish to take any more of the committee's time.

I applaud the committee's effects. I also applaud my colleagues who have also introduced bills regarding the insanity defense. I think we are going to see a melting of these bills. I think we will see the Senate take quick action on S. 2572, which includes a section addressing this issue. I do not see a rivalry in the bills. I want to applaud the gentlemen here who also have bills. I thank the committee very much for the opportunity to testify.

Senator SPECTER. Thank you very much, Senator Pressler.

[The text of S. 2669 follows:]

II

97TH CONGRESS
2D SESSION

S. 2669

To amend title 18 to limit the defense of insanity.

IN THE SENATE OF THE UNITED STATES

JUNE 23 (legislative day, JUNE 8), 1982

Mr. PRESSLER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18 to limit the defense of insanity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 16. Insanity defense

"(a) STATE OF MIND.—It shall be a defense to a prosecution under any Federal statute, that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.

"(b) APPLICATION OF THIS SECTION.—This section applies to prosecutions under any Act of Congress other than—

"(1) an Act of Congress applicable exclusively in the District of Columbia;

"(2) the Canal Zone Code; or

"(3) the Uniform Code of Military Justice (10 U.S.C. 801 et seq.).

"§ 17. Determination of the existence of insanity at the time of the offense

"(a) MOTION FOR PRETRIAL PSYCHIATRIC EXAMINATION.—Upon the filing of a notice, as provided in rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense set forth in subsection (a), the court, upon motion of the attorney for the Government, may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 19 (b) and (c).

"(b) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in rule 12.2 of the Federal Rules of Criminal Procedure on a motion by the defendant or by the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty only by reason of insanity.

"§ 18. Mandatory confinement of a person acquitted by reason of insanity of the crimes of murder and attempted murder

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON.—If a person is found not guilty only by reason of insanity of the offenses provided in sections 1111 and 1113 of title 18, United States Code, he shall be committed to a suitable facility pursuant to the provisions of subsection (d) of this section. The court shall order a hearing to determine whether the person is currently suffering from a mental disease or defect.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court shall order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 19 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 19(d), and shall be conducted not later than forty days after the date of the finding of not guilty only by reason of insanity.

"(d) DETERMINATION AND DISPOSITION.—If after the hearing, the court finds by a preponderance of evidence that the defendant acquitted only by reason of insanity is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to probation or imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for hospitalization in a suitable facility. The maximum term of such commitment shall approximately equal the maximum term of imprisonment authorized by law for the offense.

"(e) DISCHARGE FROM SUITABLE FACILITY.—When the director of the facility determines that the defendant, hospitalized pursuant to subsection (d), has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the hospitalization. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing, and may modify the provisional sentence.

"§ 19. General provisions

"(a) DEFINITIONS.—As used in this title—

"(1) 'insanity' means a mental disease or defect of a nature constituting a defense to a Federal criminal prosecution; and

"(2) 'suitable facility' means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

"(b) PSYCHIATRIC EXAMINATION.—A psychiatric examination ordered pursuant to this title shall be conducted by a licensed or certified psychiatrist, or a clinical psychologist and a medical doctor, or if the court finds it appropriate, by additional examiners. Each examiner shall be designated by the court.

"(c) PSYCHIATRIC REPORTS.—A psychiatric report ordered pursuant to this title shall be prepared by the examiner designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

"(1) the person's history and present symptoms;

"(2) a description of the psychological and medical tests employed and their results;

"(3) the examiner's findings; and

"(4) the examiner's opinions as to diagnosis, prognosis, and—

"(A) if the examination is ordered under section 17, whether the person was insane at the time of the offense charged;

"(B) if the examination is ordered under section 18, whether the person is currently suffering or in the reasonable future is likely to suffer from a mental disease or defect.

"(d) HEARING.—At a hearing ordered pursuant to this title the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to law. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS FOR SUITABLE FACILITIES.—The director of the facility in which a person is hospitalized pursuant to section 18, shall prepare annual reports concerning the mental condition of such person, and shall make recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility, and copies of the reports shall be submitted to such other persons as the court may direct.".

(b) The table of sections for chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following:

"16 Insanity defense.
"17 Determination of the existence of insanity at the time of the offense.
"18 Mandatory confinement of a person acquitted by reason of insanity.
"19 General provisions.".

○

Senator Specter. Senator Zorinsky?

STATEMENT OF HON. EDWARD ZORINSKY, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator Zorinsky. Thank you, Mr. Chairman. I want to thank you for calling this hearing. I know that your experience in law enforcement will be most valuable to this subcommittee in its study of the insanity defense.

I come here today with mixed feelings. On the one hand, I am pleased that the subcommittee is holding these hearings. On the other hand, I am very troubled by the fact that it took the recent decision in the *Hinckley* trial to generate enough interest in this subject. I was very disappointed by the verdict in that case.

I do feel that there are some positive things to be learned from the *Hinckley* case, and I hope that this committee will examine some of the lessons coming out of the trial.

Over a year ago, I introduced, along with the chairman of the Judiciary Committee, Senator Thurmond, a bill to revise the insanity defense in Federal cases. I would like to take a few minutes to review that bill and then to look at some other issues emanating from the *Hinckley* trial.

The bill I introduced last year, S. 1106, covered three important areas. The first provided for a change in the pleadings available to the defendant, namely, not guilty, guilty, or guilty but insane. We would eliminate the defense of not guilty by reason of insanity. Senator Hatch, who himself has been very active in trying to improve this area of the law, has stated his support for this proposal.

The second section of S. 1106 has to do with the defense standard to be met. Here we would do away with all of the confusing questions of what the defendant knew, and could he or she control behavior to conform to the law. Instead, we would ask if the defendant had the requisite state of mind for the offense charged; and, if not, was the lack of it because of a mental disease or defect. This is a very important matter for this subcommittee to study.

The third part of my bill would provide for continued jurisdiction and supervision by the trial court after a finding of guilty but insane. The judge would determine what treatment would be appropriate to meet the needs of a defendant, with input from the doctors. It would also be up to the trial court to approve the release for the defendant, again with input from the doctors, as well as the attorneys involved in the case. This is certainly an improvement on the current method, where, except in the District of Columbia, after a defendant is found not guilty by reason of insanity he or she is released from the custody of the Federal court. It is then up to the State to initiate involuntary confinement proceedings. If and when a defendant is to be released from custody is left up to a doctor, whose only interest is the patient, while society's interest is left unprotected.

The intent of my proposal is not punitive in any way but is an attempt to blend the needs of the defendant for treatment and the needs of society.

There are some very important lessons to be learned from the *Hinckley* trial, Mr. Chairman, and I think you addressed them in the legislation you introduced last Tuesday. The first is the need to assume that all defendants are sane and that, if a plea of insanity is entered, then it falls on the defendant to make the affirmative defense, and the burden shall rest there. This was not the case for Mr. Hinckley, based on the ruling of the trial judge. I noticed in this morning's paper that Edwin Meese, counselor to President Reagan, stated his support both for a verdict of guilty but insane and for the concept of placing the burden of proof on the defense to prove the defendant insane.

The second lesson that should be learned from the trial relates to the so-called expert testimony offered by each side's psychiatrists. I think we need to look at a way to limit this testimony to observations, and not to allow conclusions of law to be stated. I believe that you attempted to deal with this, Mr. Chairman, in your bill.

We should keep in mind that the issue of insanity is not raised very often in Federal criminal cases, but that Federal laws and procedures are used by States as guidelines for their own laws. On this issue several States have already taken action to provide for a pleading and finding of guilty but insane. I would urge this subcommittee, Mr. Chairman, to move ahead carefully but surely.

Thank you.

Senator SPECTER. Thank you very much, Senator Zorinsky.

[The text of S. 1106 follows:]

II

97TH CONGRESS
1ST SESSION

S. 1106

To reform the insanity defense.

IN THE SENATE OF THE UNITED STATES

MAY 5 (legislative day, APRIL 27), 1981

Mr. ZORINSKY (for himself and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To reform the insanity defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the first sentence of paragraph (a) of rule 12 of the Federal Rules of Criminal Procedure is amended by adding after "guilty" the following: ", guilty but insane".

(b) Rule 12 is amended by adding at the end thereof the following new paragraph:

"(i) The plea of guilty but insane shall be entered pursuant to rule 12.2.".

SEC. 2. Rule 12.2 of the Federal Rules of Criminal Procedure is amended to read as follows:

"Rule 12.2.—Notice of Plea of Guilty But Insane

"(a) If a defendant intends to rely upon the plea of guilty but insane, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this paragraph, the plea of guilty but insane may not be entered. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

"(b) If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the state of mind required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

"(c) In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination as provided by 18 U.S.C. 4242 by at least two qualified psychiatrists designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

"(d) If there is a failure to give notice when required by paragraph (b) or to submit to an examination when ordered under paragraph (c), the court may exclude the testimony of any expert witness offered by the defendant on the issue of his state of mind.

"(e) A defendant is guilty but insane if his actions constitute all necessary elements of the offense charged other than the requisite state of mind, and he lacked the requisite state of mind as a result of mental disease or defect.".

SEC. 3. Chapter 313 of title 18, United States Code, is amended to read as follows:

"CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

"Sec.
"4241. Determination of mental competency to stand trial.
"4242. Determination of the existence of insanity at the time of the offense.
"4243. Hospitalization of a person found guilty but insane.
"4244. Hospitalization of a convicted person suffering from mental disease or defect.
"4245. Hospitalization of an imprisoned person suffering from mental disease or defect.
"4246. Hospitalization of a person due for release but suffering from mental disease or defect.

"4247. General provisions for chapter 313.

"§ 4241. Determination of mental competency to stand trial

"(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable mental hospital, or in another facility designated by the court as suitable—

"(1) for such a reasonable period of time as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

"(2) for an additional reasonable period of time until—

"(A) his mental condition is so improved that trial may proceed; or

"(B) the pending charges against him are disposed of according to law.

If a defendant's mental condition is determined to be such that there is not substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

"(e) DISCHARGE FROM MENTAL HOSPITAL.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial.

"(f) Admissibility of Finding of Competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

"§ 4242. Determination of the existence of insanity at the time of the offense

"(a) Motion for Pretrial Psychiatric Examination.—Upon the filing of a notice, as provided in rule 12.2

of the Federal Rules of Criminal Procedure, the court, upon motion of the attorney for the Government, may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(b) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a non-jury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty; or

"(3) guilty but insane.

"§ 4243. Hospitalization of a person found guilty but insane

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF CONVICTED PERSON.—If a person is found guilty but insane, the court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another. The court may make any order reasonably necessary to secure the appearance of the person at the hearing.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that a person found guilty but insane is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled if such State will assume responsibility for his care, custody, and treatment. If such State will not then assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until such State will assume such responsibility or until the person's mental condition is so improved that his release would not create a substantial danger to himself or to the person or property of another.

"(e) DISCHARGE FROM MENTAL HOSPITAL.—When the director of the facility in which a person found guilty but insane is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial danger to himself or to the person or property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial danger to himself or to the person or property of another, the court shall order his immediate discharge.

"§ 4244. Hospitalization of a convicted person suffering from mental disease or defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF CONVICTED DEFENDANT.—A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, file a motion for a hearing on the present mental condition of the defendant. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody, care, or treatment in a mental hospital.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c). In addition to the information required to be included in the psychiatric report pursuant to the provisions of section 4247(c), if the report includes an opinion by the psychiatrists that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody, care, or treatment in a mental hospital, the report shall also include an opinion by the psychiatrists concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) Determination and Disposition.—If, after the hearing, the court is of the opinion that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to probation or imprisonment, be committed to a mental hospital for custody, care, or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable mental hospital, or in another facility designated by the court as suitable. Such a commitment constitutes a provisional sentence to the maximum term authorized for the offense of which the defendant was found guilty.

"(e) Discharge From Mental Hospital.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody, care, or treatment in a mental hospital, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether the provisional sentence should be reduced. After the hearing, the court may order that the defendant be released, be placed on probation, or be imprisoned for the remainder of the sentence or for any lesser term.

"§ 4245. Hospitalization of an imprisoned person suffering from mental disease or defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF IMPRISONED DEFENDANT.—A defendant serving a sentence of imprisonment, or an attorney for the Government at the request of the director of the facility in which the defendant is imprisoned may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court shall grant the motion if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody, care, or treatment in a mental hospital. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court is of the opinion that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody, care, or treatment in a mental hospital, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until he is no longer in need of custody, care, or treatment in a mental hospital or until the expiration of his sentence of imprisonment.

"(e) DISCHARGE MENTAL HOSPITAL.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody, care, or treatment in a mental hospital, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the sentence imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned.

"§ 4246. Hospitalization of a person due for release but suffering from mental disease or defect

"(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized pursuant to this chapter certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dropped, is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another, and that suitable arrangements for the custody and care of the person are not otherwise available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that, a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled if such State will assume responsibility for his care, custody, and treatment. If such State will not then assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until such State will assume such responsibility or until the person's mental condition is so improved that his release would not create a substantial danger to himself or to the person or property of another.

"(e) DISCHARGE FROM MENTAL HOSPITAL.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial danger to himself or to the person or property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial danger to himself or to the person or property of another, the court shall order his immediate discharge.

"§ 4247. General provisions for chapter 313

"(a) DEFINITION.—As used in this chapter, 'insanity' means a mental disease or defect as a result of which a person lacked the state of mind required as an element of the offense charged.

"(b) PSYCHIATRIC EXAMINATIONS.—A psychiatric examination ordered pursuant to this chapter shall be conducted by at least two qualified psychiatrists. The psychiatrists shall be—

"(1) designated by the court if the examination is ordered under section 4241, 4242, 4243, or 4244; or

"(2) designated by the court, and shall include one psychiatrist selected by the defendant, if the examination is ordered under section 4245 or 4246.

For the purpose of an examination pursuant to an order under section 4241, 4242, 4243, or 4244, the court may commit the person to be examined for a reasonable period, but not more than sixty days, to the custody of the Attorney General for placement in a suitable mental hospital or another facility designated by the court as suitable.

"(c) PSYCHIATRIC REPORTS.—A psychiatric report ordered pursuant to this chapter shall be prepared by the psychiatrists designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

"(1) the person's history and present symptoms;

"(2) a description of the psychological and medical tests employed and their results;

"(3) the psychiatrists' findings; and

"(4) the psychiatrists' opinions as to diagnosis, prognosis, and—

"(A) if the examination is ordered under section 4241, whether the person is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

"(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

"(C) if the examination is ordered under section 4243 or 4246, whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another; or

"(D) if the examination is ordered under section 4244 or 4245, whether the person is presently suffering from a mental disease or defect as a result of which he is in need of custody, care, or treatment in a mental hospital.

"(d) HEARING.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him. The person shall be afforded an opportunity to testify, to present evidence, to subpena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) PERIODIC REPORTS BY MENTAL HOSPITAL.—The director of the facility in which a person is hospitalized pursuant to—

"(1) section 4241 shall prepare semiannual reports; or

"(2) section 4243, 4244, 4245, or 4246 shall prepare annual reports;

concerning the mental condition of the person and recommendations concerning his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

"(f) ADMISSIBILITY OF A DEFENDANT'S STATEMENTS AT TRIAL.—A statement made by the defendant during the course of a psychiatric examination pursuant to section 4241 or 4242 is not admissible as evidence against the accused on the issue of guilt in any criminal proceeding.

"(g) HABEAS CORPUS UNIMPAIRED.—Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus his eligibility for release under such sections.

"(h) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.—The Attorney General—

"(1) may contract with a state, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

"(2) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246; and

"(3) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter.".

Senator Specter. We have been joined by our colleague, Senator Heflin. Do you have an opening statement, Senator?

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator Heflin. Mr. Chairman, I am deeply disturbed by the Hinckley verdict. I consider it one of the great miscarriages of justice in our Nation's history.

Most of the historical miscarriages of justice have occurred in the past when an innocent person was found guilty. I think this is an unusual situation. The public's indignation that is rising in this instance is because of the notoriety and the feeling that the system of justice that we have is not measuring up to its responsibility.

We are dealing with two systems which are less than perfect. I think we have to acknowledge in the beginning that the field of psychiatry is less than perfect. There are wide differences of opinion on many aspects of psychological behavior and responsibility dealing with criminal acts. Our system of justice has been imperfect. This is not to say that in the field of psychiatry or in our system of justice that we ought not to strive toward a more perfect system. I think that we need to do it, but I think it has to be done under careful study.

The field of psychiatry, its relationship to the criminal justice system has been evolving for a long time. It has largely been dealing with standards such as the *M'Naghten* rule or the *Durham* rule and then the American Law Institute's model penal code and other things that have developed in this regard.

I think we have to look at the relationship of the issue of insanity and its effect upon responsibility for criminal acts in a number of different areas. I think that first we ought to carefully review the determination system. Should there be a separate determination of guilt or the issue of "did the accused do the act." And then look at the question of the determination of responsibility if a mental issue is raised. If you are to determine that there ought to be a separation in regard to these two determinations, then the issue rises as to whether or not it should be in regard to the issue of insanity or whether it ought to be a jury determination or whether it ought to be by some panel of experts or whether it ought to be by a judge.

There are also issues of constitutional right of trial by jury that enter into any bifurcated approach certainly in the absence of a determination by jury.

On the other hand, if the issue is not to go off on a bifurcated approach, there are certain approaches that certainly ought to be considered and evaluated to date. One of these issues is, of course, the issue of the language, such as not guilty or guilty. These words have certain connotations. The words "not guilty by reason of insanity" in regard to the *Hinckley* case, those words not guilty are the words that are causing the public indignation and the feeling in this regard concerning this case.

On the other hand, the word "guilty" is a word in which some people look at it with the idea that there is a stigma that is attached to a person that is really not responsible for his action.

So, I think you have to look at the choice of semantics. We have gone under the concepts historically "guilty" or "not guilty." Are there other words that mean the same thing but do not cause the wrath of indignation that can arise or, on the other hand, does not leave a person who is clearly mentally not responsible for his action with a stigma and his family with a stigma.

There is the issue of the burden of proof that has been raised. Historically, in the Anglo-American system of jurisprudence, you have had the concept of the proving guilt beyond a reasonable doubt. This is opposed to many other European systems in which the burden is really placed upon the defendant to prove that he is not guilty. So, the concept of the Anglo-American system of justice of proof beyond a reasonable doubt of all elements in a crime is an issue, I think, that has to be considered in view of any possible changes that you might have.

The defense of not guilty by reason of insanity has been, in effect, an affirmative defense from pleading. You have had to come forward with it in most of the jurisdictions. In the event that a plea of not guilty by reason of insanity is not entered, then you do not have the right to proceed during the trial. It is called for as being an affirmative plea that has to be made.

There are alternatives. Rather than placing the burden of proof on the prosecution to prove beyond a reasonable doubt all elements of the crime when a plea of insanity is raised, there is the issue of transferring a burden of proof not altogether on the basis of a reasonable doubt to the defendant but to a preponderance of the evidence or to a clear and convincing evidence standard.

These are matters that I think we ought to consider as we move forward with this.

Then there are the standards, the *M'Naghten* rule, the *Durham* rule, the American Law Institute model penal code, the mens rea rule that is being considered. If you go toward additional language such as the language that has been suggested as guilty but insane, do you have a standard in regard to a finding of that verdict for a jury that is separate from a verdict of not guilty by reason of insanity? Not guilty by reason of insanity may involve a different and separate standard. It may involve a question of a different burden of proof. A guilty but insane issue may be entirely—and the standard, of course, probably in all manners would be different as it would certainly appear to me that it would have to be different.

Another use of language should be considered. It may not be that because of the public's perception of guilty and not guilty that other language could be used. But this is something, I think, that we ought to delve into.

There are a lot of issues. There is the issue that, if a person like Hinckley is found not guilty by reason of insanity, what happens. What is the proper procedure to protect the public from a person being released or being protected from himself?

These are all issues. I say they are some issues that are complicated. They are issues that in my judgment ought to be carefully considered. I think a reasoned approach should come forth rather than an emotional approach. If we approach it from an emotional hurried basis, then I think there is the danger that you will have defects that arise. It seems to me that this is a nationwide debate issue. We have got to make improvements. There has been a miscarriage of justice. There is a need for a change of law. But I think it has to be done very carefully and from a studious point of view. Thank you, Mr. Chairman.

Senator **SPECTER**. Thank you very much, Senator Heflin. Senator Dole, as a member of the Subcommittee on Criminal Law, has submitted a very brief statement which I think should be read into the record at this time. Senator Dole is occupied with work on the Finance Committee. It reads as follows:

OPENING STATEMENT OF HON. ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS

Mr. Chairman, I commend you for convening this hearing to examine the role of the insanity defense in criminal prosecutions in the Federal system. In the wake of the verdict in the case of John Hinckley, it becomes increasingly clear that a defense plea of insanity on its face raises issues that our system has difficulty resolving under the state of current laws.

Issues regarding the adequacy of our present concepts of personal responsibility and criminal culpability: Is the term insanity too loosely defined in our law? Should the insanity defense allow an offender guilty of a premeditated, intentional act to be nevertheless found innocent of resulting harm? Is the insanity defense as presently understood and constructed confusing to the average jury? Should the burden of proof rest on the defense in these cases?

These are questions which the Congress is in a unique position to explore. I welcome these hearings as the first congressional effort to grapple with the conflict between a relatively new medical discipline, psychiatry, and ancient concepts of jurisprudence regarding criminal responsibility. Psychiatry has become the new religion of our society. All too often, the law looks to psychiatry to explain human behavior that has its roots in the complex spiritual, moral, and ethical choices made by an individual at each stage of his or her life.

The legitimate role of the psychiatrist is diagnosis and treatment, not the rendition of judgment on questions of criminal responsibility. Perhaps the law has erred in vesting in a young science the task of assessing the degree of culpability an individual claiming insanity bears for the commission of a criminal act. Although statistics show that the insanity defense is rarely invoked in criminal prosecutions, the violent nature of the acts it is usually associated with demands that its use be governed by the most stringent rules that we can devise which are consistent with enlightened principles of accountability under the law.

Mr. Chairman, we must be clear on one thing. We are not here to make judgments on either Mr. Hinckley's culpability under the law, the verdicts rendered by the jury in that case, or the appropriate disposition of the defendant at the commitment hearings. We are here in the hopes that the witnesses appearing before us today can shed much-needed light on the troubling questions which a plea of not guilty by reason of insanity provokes.

Thank you, Mr. Chairman.

Senator **SPECTER**. Those are the comments of Senator Dole.

[The text of S. 1995 follows:]

II

97TH CONGRESS
1ST SESSION

S. 1995

To remedy procedural and structural defects in the criminal justice system.

IN THE SENATE OF THE UNITED STATES

DECEMBER 16 (legislative day, NOVEMBER 30), 1981

Mr. DOLE (for himself and Mr. EAST) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To remedy procedural and structural defects in the criminal justice system.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Procedures Act of 1982".

PURPOSE

SEC. 2. The purpose of this Act is to amend Federal criminal procedures in such respects as are necessary to provide for increased effectiveness, fairness, and certainty in the administration of the criminal statutes of the United States.

CRIMINAL FORFEITURES

SEC. 3. (a) Section 1963 of title 18, United States Code, is amended—

(1) in subsection (a) by inserting after "of this chapter shall", the following: ", upon the first such conviction,";

(2) in subsection (a) by striking out "and" after "1962,";

(3) in subsection (a) by inserting before the period the following: ", and (3) any profits or proceeds of the unlawful activities engaged in by the individual found to have violated such section, in whatever form held, and without regards to whether or not legal title to such profits or proceeds is vested in such individual";

(4) by redesignating subsections (b) and (c) as subsections (f) and (g); and

(5) by inserting after subsection (a), the following new subsections:

"(b)(1) Whoever is convicted of violating any provision of section 1962 of this chapter, after having been previously convicted for a separate violation of any of the provisions of such section, shall, where such subsequent conviction is in whole or in part based upon acts committed since the date of the first such conviction, be fined not less than $50,000 nor more than $200,000 for each such subsequent violation, and shall be sentenced to a term of life imprisonment. Such person shall not be eligible for probation upon such subsequent conviction, nor shall such person be eligible for parole or furlough, upon such term of imprisonment before having served a minimum of twenty years of such term of imprisonment.

"(2) In addition to the foregoing, such person so convicted of a second offense under section 1962 of this chapter shall forfeit to the United States any interest in property forfeitable under the provisions of subsection (a) of this section, as well as any and all interests in personal or real property acquired by him or by another person for his use and benefit since the date of the first such conviction, or the proceeds thereof in whatever form, if it be shown by a preponderance of the evidence that—

"(A) such person was not engaged in any lawful, gainful employment during the period from the first such conviction up to the date of the filing of criminal charges which form the basis for the second such conviction;

"(B) such person, although engaged in lawful employment during the period specified in subparagraph (A) of this paragraph, nevertheless obtained the majority portion of his income during such period from unlawful activities; or

"(C) such person did, during the period specified in subparagraph (A) of this paragraph, commit or cause to be committed an act of injury or destruction to persons or property for the purpose of furthering or concealing the unlawful activities which formed the basis for such person's subsequent conviction, whether such acts were committed or caused to be committed by him personally or through his agent or employee.

"(3) Such real and personal assets as are forfeitable under the provisions of this section shall be forfeitable even though they have been transferred to the control and ownership of another person, if it be shown that the actual use and benefit of such property was retained by the convicted person whose assets are subject to such forfeiture; or, if it be shown that such assets were transferred to another person who aided and abetted the commission of the criminal acts for which such person whose assets are forfeitable was convicted, regardless of who may have the use and benefit of such property.

"(c) To the extent that assets, interests, profits, and proceeds forfeitable under this section—

"(1) cannot be located;

"(2) have been transferred, sold to, or deposited with third parties; or

"(3) have been placed beyond the jurisdiction of the United States,

the court, upon conviction of the individual charged, may direct the defendant to forfeit such other assets as may be available, limited in value to those assets that would otherwise be forfeited under subsections (a) and (b) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsections (a) and (b) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.".

(b) Section 408 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Public Law 91-513, 21 U.S.C. 848) is amended—

(1) in subsection (a)(1) thereof—

(A) by striking out "in paragraph (2)", prior to the first semicolon in such subsection and inserting in lieu thereof the following: "by this section"; and

(B) by striking out the words "in paragraph (2)" at the end of such subsection and inserting in lieu thereof "this section";

(2) in subsection (a)(2)(A) by adding after "the profits obtained by him in such enterprise" the following: ", including any profits and proceeds, regardless of

the form in which held, that are acquired, derived, used, or maintained, directly or indirectly, in connection with or as a result of a violation of paragraph (1)";

(3) by adding after subsection (a)(2) the following:

"(3) Any person who is convicted a second time under paragraph (1) of continuing in a criminal enterprise shall forfeit to the United States all property which is forfeitable under the provisions of subsection (a)(2) of this section, in addition to any and all interest of such person in personal or real property acquired by him or by another person for his use and benefit since the date of the first such conviction, or the proceeds thereof in whatever form, if it be shown by a preponderance of the evidence, that—

"(A) such person was not engaged in any lawful, gainful employment during the period from the first such conviction up to the date of the filing of criminal charges which form the basis for the second such conviction;

"(B) such person, although engaged in lawful employment during the period specified in subsection (a)(3)(A)(i) above, nevertheless obtained the majority portion of his income during such period from unlawful activities; or

"(C) such person did, during the period specified in subsection (a)(3)(A)(i) above, commit or cause to be committed acts of injury or destruction to persons or property for the purpose of furthering or concealing the unlawful activities which formed the basis for such person's subsequent conviction, whether such acts were committed or caused to be committed by such person personally or by or through an agent or employee of such person.

Such real and personal assets as are forfeitable under the provisions of this section shall be forfeitable even though they have been transferred to the control and ownership of another person, if it be shown that the actual use and benefit of such property was retained by the convicted person whose assets are subject to forfeiture; or, if it be shown that such assets were transferred to another person who aided and abetted the commission of the criminal acts for which such person whose assets are subject to forfeiture was convicted, regardless of who may have the use and benefit of such property."; and

(4) by adding the following new subsection after subsection (d):

"(e) To the extent that assets, interests, profits, and proceeds forfeitable pursuant to this section—

"(1) cannot be located;

"(2) have been transferred, sold to, or deposited with third parties; or

"(3) have been placed beyond the territorial jurisdiction of the United States,

the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsection (a) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsection (a) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.".

(c)(1) Title 28, United States Code, is amended by adding after section 529 thereof the following:

"§ 529A. Negotiations with foreign governments

"(a) The Attorney General shall move expeditiously to conduct negotiations to conclude agreements to secure the cooperation of the law enforcement authorities of foreign countries in order to effectively deprive domestic criminals of the use of foreign havens for the proceeds of their crimes.

"(b) The Attorney General shall report to the Committees on the Judiciary of the Senate and the House of Representatives within six months after the date of enactment of this section on progress being made to conclude such agreements.".

(2) The table of sections for chapter 31, title 28, United States Code, is amended by adding after the item relating to section 529, the following:

"529A. Negotiations with foreign governments.".

BAIL REFORM

Sec. 4. (a) Sections 3150, 3151, and 3152 of title 18, United States Code, are redesignated as sections 3156, 3157, and 3158, respectively.

(b) Chapter 207 of title 18, United States Code, is amended by striking out sections 3146–3149 and inserting in lieu thereof the following:

"§ 3146. Release authority generally

"Any person charged with an offense may be ordered released or detained pursuant to the provisions of this chapter by a judge authorized to order the arrest and commitment of offenders, but a person charged with an offense for which a sentence of death is authorized may be ordered released only by a judge of a court of the United States that has original jurisdiction in criminal cases.

"§ 3147. Release pending trial in a noncapital case

"(a) Any person charged with an offense, other than an offense for which a sentence of death is authorized, shall, at his appearance before a judge, be ordered detained or released pending trial. If released, the person may be released on his personal recognizance, or upon the execution of an unsecured appearance bond in an amount specified by the judge, and upon the mandatory condition set forth in subsection (d) of this section, unless the judge determines, in the exercise of his discretion, that such release will not reasonably assure the appearance of the person as required. If such a determination is made, the judge shall, either in lieu of or in addition to the above methods of release, impose the mandatory condition set forth in subsection (d) and the least restrictive condition or combination of conditions of release set forth in subsection (e) that will reasonably assure the appearance of the person for trial. After the court has determined the conditions of release pursuant to this subsection, and the person has indicated that he can satisfy those conditions, the court shall consider the provisions of subsection (b).

"(b) The court upon ordering the detention or release of a person pursuant to subsection (a) shall determine, in the exercise of its discretion, whether such release will endanger the safety of any other person or the community. If such a determination is made, the judge shall, either in lieu of or in addition to the conditions set pursuant to subsection (a), impose the least restrictive condition or combination of conditions of release set forth in subsection (e) that will reasonably assure the safety of any other person or the community. No financial condition set forth in subsection (e) may be imposed to assure the safety of any person or of the community.

"(c) If, after a due process hearing as defined in section 3149(d) of this chapter the court finds that there is clear and convincing evidence that the person is likely to flee or is a danger to any other person or to the community, and that no condition or combination of conditions of release will reasonably assure the defendant's appearance or the safety of any other person or of the community, then the court shall order such person detained in custody.

"(d) The judge shall provide as an explicit condition of release for any person ordered released pursuant to this subsection, that the person not commit a Federal, State, or local crime during the period of his release.

"(e) The judge may provide as an explicit condition of release for any person ordered released pursuant to this subchapter that the person—

"(1) remain in the custody of a designated person who agrees to supervise him, if the designated person is reasonably able to assure the judge that the person will appear as required and will not pose a danger to the safety of another person or the community;

"(2) abide by specified restrictions on his travel, associations, or place of abode;

"(3) work conscientiously at his employment, or if unemployed, actively seek employment;

"(4) report on a regular basis to a designated law enforcement agency or pretrial service agency;

"(5) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(6) avoid all contact with potential witnesses who may testify concerning the offense;

"(7) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(8) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

"(9) execute an appearance bond in a specified amount and deposit in the registry of the court, in cash or other security as directed, a sum not to exceed 10 per centum of the amount of the bond, which deposit is to be returned upon the performance of the conditions of release;

"(10) execute a bail bond with solvent sureties, or deposit cash in lieu of such a bond; or

"(11) satisfy any other condition reasonably necessary to assure appearance as required pursuant to subsection (a) and to assure the safety of any other person or the community pursuant to subsection (b), including a condition requiring that the person return to official detention after specified hours or during specified periods, and abide by such other restrictions on the person's freedom, associations, or activities that the court deems appropriate.

A defendant who is detained or subject to restrictions because of the imposition of a condition set forth in subsection (e)(11) shall be brought to trial expeditiously pursuant to the provisions of chapter 208 of this title. The court may only impose financial conditions of release pursuant to this subsection for the purpose of assuring a defendant's appearance in court.

"(f) In determining whether the person should be detained or which conditions of release will reasonably assure the appearance of the person as required and will reasonably assure the safety of any other person or the community, the judge shall, on the basis of available information, take into account—

"(1) the nature and circumstances of the offense charged;

"(2) the weight of the evidence against the person; and

"(3) the history and characteristics of the person, including his character, mental condition, family ties, employment, past conduct, length of residence in the community, financial resources, record of convictions, record of appearance, flight to avoid appearance, or nonappearance at court proceedings, the use of illegal drugs, whether he was on probation, parole, or other release pending completion of sentence for a conviction under Federal, State, or local law at the time of the current arrest, and whether he was on pretrial release or release pending sentence or appeal for an offense under Federal, State, or local law at the time of the current arrest.

"(g) A judge authorizing the release or detention of a person pursuant to this section shall issue an order containing a statement of the reasons for detention if imposed, or any conditions of release imposed, shall advise him of the penalties applicable to a violation of a condition of his release, and shall advise him that a warrant for his arrest will be issued immediately upon such a violation.

"(h) In any case in which a judge has ordered a person detained and has imposed conditions upon the release of such person, if, twenty-four hours after the release hearing, such person continues to be detained because of his inability to meet the conditions of release he may, upon application, have the detention order or conditions reviewed by the judge who imposed them. A person who is detained or ordered released on a condition that requires him to return to official detention after specified hours may, upon application, have the order of detention or condition reviewed by the judge who imposed it. Unless the order of detention or conditions of release are amended and the person is thereupon detained or released on another condition, the judge shall set forth in writing the reasons for continuing the detention or conditions imposed. If the judge who ordered the detention or imposed conditions of release is not available, any other judge in the district may review such conditions.

"(i) A judge ordering the detention or release of a person on a condition specified in this section may at any time amend his order to impose additional or different conditions of release. If the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions, the provisions of subsection (h) are applicable.

"(j) Any information may be presented and considered in connection with an order entered pursuant to this section regardless of its admissibility under the rules governing admission of evidence in criminal trials.

"(k) A judge may detain, for a period of ten days or less, a person charged with an offense who comes before him for a pretrial release determination if it appears that the person—

"(1) is, and at the time the offense was committed was, on pretrial or other release for a felony under State or Federal law; or

"(2) is on probation, parole, or other release pending completion of sentence for any offense under Federal, State, or local law;

and that the person may flee or pose a danger to any other person or to the community if released. During the ten-day period, the United States attorney shall notify the appropriate court, probation, or parole official. If the official fails or declines to take the person into custody during such period, the person shall be treated in accordance with the provisions of subsections (a) through (e).

"(l) A court may dispose of an offense that is a misdemeanor or an infraction by entering an order directing forfeiture of collateral posted to assure appearance if a fine in such an amount would be an appropriate sentence after conviction of the offense charged.

"§ 3148. Release pending trial in a capital case

"A person who is charged with an offense for which a sentence of death is authorized shall be treated in accordance with the provisions of section 3147, unless the judge has reason to believe that no conditions of release will reasonably assure that the person will not flee or will not pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, the person shall be ordered detained. Such an order is not appealable under section 3151, but may be reviewed under other provisions for review of conditions of release or orders of detention.

"§ 3149. Release pending sentence or appeal

"(a) The judge shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of his sentence be held in official detention unless the judge finds, pursuant to a due process hearing, by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or to the community. If the judge finds that the person is not likely to flee or to pose a danger to the safety of any person or to the community, the person shall be treated in accordance with the provisions of section 3147.

"(b) The judge shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be held in official detention, unless the judge finds pursuant to a due process hearing—

"(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community; and

"(2) that the appeal is not frivolous nor taken for purposes of delay.

If the judge finds that the person is not likely to flee or pose a danger to the safety of any other person or the community and that the appeal is not frivolous or taken for purposes of delay, the person shall be treated in accordance with the provisions of section 3147.

"(c) The judge shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 in accordance with the provisions of section 3147.

"(d) For the purposes of this section and section 3147(c), 'due process hearing' means a hearing conducted in accordance with the requirements of the due process clause of the fifth amendment to the United States Constitution including but not limited to the right to counsel, the right to cross-examine witnesses, and the right to present evidence.

"§ 3150. Release of a material witness

"If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpena, a judge may order the arrest of such witness and shall impose conditions of release pursuant to section 3147. No material witness may be detained because of his inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

"§ 3151. Appeal from denial of release

"(a) Any person—

"(1) who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued; and

"(2) whose application pursuant to section 3147 (h) and (i) has been reviewed by a judge other than—

"(A) a judge of the court having original jurisdiction over the offense with which he is charged;

"(B) a judge of a United States court of appeals; or

"(C) a Justice of the Supreme Court of the United States;

may file a motion with the court having original jurisdiction over the offense with which he is charged for an amendment to the order. Such a motion shall be determined promptly.

"(b) In a case in which a person is detained after—

"(1) a court denies a motion under subsection (a) to amend an order imposing conditions of release; or

"(2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged;

an appeal may be taken to the court having appellate jurisdiction over such court. An order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3147. Such an appeal shall be determined promptly.

"§ 3152. Sanctions for violation of release conditions

"(a) A person who has been released pursuant to section 3147, and who has violated a condition of release, is subject to revocation of such release, an order of detention, and a prosecution for contempt of court in addition to such further criminal or civil penalties which may be applicable to the circumstances of the violation.

"(b) An attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judge may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judge in the district in which his arrest was ordered for a proceeding in accordance with this section. The judge shall enter an order of revocation and detention if, after a hearing, the judge—

"(1) finds that there is clear and convincing evidence that such person has violated a condition of his release; and

"(2) finds that—

"(A) based on the factors set forth in section 3147(f), there is no condition or combination of conditions of release that will assure that such person will not flee or pose a danger to the safety of any other person or of the community; or

"(B) no condition or combination of conditions will assure that the person will abide with such reasonable conditions of release as may be imposed by the court.

If the judge finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such appropriate conditions, he shall treat the person in accordance with the provisions of section 3147 and amend conditions of release to the extent necessary to assure compliance with the conditions of release.

"(c) A law enforcement officer, authorized to make an arrest for an offense committed in his presence, may arrest a person who has been released pursuant to section 3147 if he has reasonable grounds to believe that the person has violated a condition of release imposed on such person and set forth in subsection 3147(e)(2), 3147(e)(5), 3147(e)(6), or 3147(e)(7).

"§ 3153. Release in a case removed from a State court

"If the judgment of a State court in a criminal proceeding is before the Supreme Court of the United States for review, the defendant may not be released from custody pending such review other than pursuant to the laws of such State.

"§ 3154. Surrender of an offender by a surety

"A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, delivered to a United States marshal, and brought before a judge. At the request of the surety, the judge shall order the person held in official detention, and shall endorse on the recognizance, or on the certified copy of the recognizance, the discharge and exoneretur of the surety. The person so committed shall be held in official detention until released pursuant to this chapter or to another provision of law.

"§ 3155. Commitment of an arrested person

"(a) A person who is arrested and charged with an offense or held as a material witness and who is not ordered released pursuant to the provisions of this chapter, shall be ordered committed to the custody of the Attorney General for confinement in a facility for official detention. A copy of the order shall be delivered to the person in charge of the facility as evidence of his authority to hold the arrested person, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

"(b) The person in charge of an official detention facility to whom an arrested person is delivered pursuant to the provisions of subsection (a) shall deliver the person to a United States marshal for the purpose of a court appearance on order of a court of the United States or on request of an attorney for the Government.".

(c) The table of sections for chapter 207 of title 18, United States Code, is amended by adding after the item relating to section 3145 the following:

"3146. Release authority generally.
"3147. Release pending trial in a noncapital case.
"3148. Release pending trial in a capital case.
"3149. Release pending sentence or appeal.
"3150. Release of a material witness.
"3151. Appeal from denial of release.
"3152. Sanctions for violation of release conditions.
"3153. Release in a case removed from a State court.
"3154. Surrender of an offender by a surety.
"3155. Commitment of an arrested person.
"3156. Penalties for failure to appear.
"3157. Contempt.
"3158. Definitions.".

EXCLUSIONARY RULE

SEC. 5. (a) Chapter 223 of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 3505. Exclusionary rule

"(a) No evidentiary matter, otherwise admissible under applicable law, shall be excluded from being considered by the court or by the jury in any Federal criminal proceeding solely on the grounds that such evidence has been obtained in violation of any regulatory, statutory, or constitutional provision of Federal or State law, unless the court finds as a matter of law that such evidence—

"(1) was obtained by the employment of methods which constituted a violation of constitutionally protected rights of a defendant, which violation resulted in actual prejudice to such defendant; and

"(2) was obtained as a result of intentional misconduct by agents of the Government of such a nature as to indicate—

"(A) willful intent to subvert the requirements of the law, or

"(B) gross negligence with respect to or wanton disregard for, the requirements of the law or the rights of the defendant; and

"(3) was not, and would not have been, known to agents of the Government but for the acts done in violation of the defendant's constitutional rights.

"(b) In evaluating the prejudicial nature of the acts constituting a violation of a defendant's constitutional rights, the court shall consider the totality of the circumstances, including the following:

"(1) the extent to which the violation was willful or reckless;

"(2) the extent to which privacy was invaded; and

"(3) the extent to which exclusion will tend to prevent such violations.

"(c) In applying this section, no court shall prohibit the consideration of any evidence by the court or jury which was procured by officers who acted in good faith reliance upon a reasonable belief in the legitimacy of their actions in obtaining such evidence, regardless of any violation of law which may have occurred pursuant thereto.".

(b) Chapter 171 of title 28, United States Code, is amended—

(1) in section 2671 by adding at the end thereof the following paragraph:

"'Investigative or law enforcement officer' means any officer of the United States empowered by law to execute searches, to seize evidence, or to make arrests for any violation of Federal law, or any person acting under the authority of such officer.";

(2) in section 2674 by adding before the period at the end of the first paragraph thereof the following: ", except as provided herein"; and

(3) by adding at the end thereof the following:

"§ 2681. Tort claims: Illegal search and seizure

"(a) The United States shall be liable for any damages resulting from tortious acts of the types specified in section 2680(h) of this chapter which are committed by an investigative or law enforcement officer of the United States during a search or seizure conducted by such officer while acting within the scope of his office or employment, where such search or seizure is conducted in violation of the fourth amendment to the United States Constitution: *Provided,* That such violation was one—

"(1) that was committed with willful intent to subvert the requirements of the law, or

"(2) that was the result of gross negligence with respect to, or wanton disregard for, the requirements of the law or the constitutional or statutory rights of the aggrieved party.

"(b) Any person aggrieved by such a violation may recover such actual and punitive damages as the court may award under subsection (c) of this section.

"(c) Punitive damages may be awarded by the court upon consideration of all the circumstances of the case, including—

"(1) the extent of the investigative or law enforcement officer's deviation from permissible conduct;

"(2) the extent to which the violation was willful or a result of grossly negligent behavior;

"(3) the extent to which the aggrieved person's privacy was invaded;

"(4) the extent of the aggrieved person's personal injury, both physical and mental;

"(5) the extent of any property damage; and

"(6) the effect such an award would have in preventing future violations of the fourth amendment to the United States Constitution.

"(d) Notwithstanding subsections (b) and (c) of this section, the recovery of any person who is convicted of any offense for which evidence of such offense was seized in violation of the fourth amendment to the United States Constitution is limited to actual physical personal injury and to actual property damage sustained as a result of the unconstitutional search and seizure.

"(e) No judgment, award, compromise, or settlement of any action brought under this section shall exceed the amount of $25,000, including actual and punitive damages.

The United States shall not be liable for interest prior to judgment.

"(f) Any action under this section shall be brought within the period of limitations provided in section 2401(b) of this title, and shall be brought in accordance with, and subject to, all other applicable provisions of this chapter and section 1346(b) of this title.

"(g) The tort remedy against the United States provided for in this section shall apply only to claims arising on or after the date of enactment of this section.

"§ 2682. Frivolous tort claims

"A party who files a lawsuit against the United States under the provisions of this chapter may be held liable to the Government by the court (upon the motion of the Government) for expenses incurred by the Government in defending such lawsuit, including a reasonable sum equivalent in value to the services rendered by the Government attorneys in defense of such lawsuit if such lawsuit is judicially determined to be founded upon claims which are clearly frivolous and lacking in any substantial merit.".

MENTAL IMPAIRMENT OF CRIMINAL OFFENDERS OR DEFENDANTS

SEC. 6. (a) Chapter 313 of title 18, United States Code, is amended to read as follows:

"CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

"Sec.
"4241. Determination of mental competency to stand trial.
"4242. Determination of the existence of insanity at the time of the offense.
"4243. Hospitalization of a person found not guilty by reason of insanity.
"4244. Hospitalization of a convicted person suffering from mental disease or defect.
"4245. Hospitalization of an imprisoned person suffering from mental disease or defect.
"4246. Hospitalization of a person due for release but suffering from mental disease or defect.
"4247. General provisions for chapter 313.

"§ 4241. Determination of mental competency to stand trial

"(a) At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

"(b) Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable mental hospital, or in another facility designated by the court as suitable—

"(1) for such a reasonable period of time as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

"(2) for an additional reasonable period of time until—

"(A) his mental condition is so improved that trial may proceed; or

"(B) the pending charges against him are disposed of according to law.

If a defendant's mental condition is determined to be such that there is not substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

"(e) When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial.

"(f) A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

"§ 4242. Determination of the existence of insanity at the time of the offense

"(a) Upon the filing of a notice, as provided in rule 12.2 of the Federal Rules of Criminal Procedure, the court, upon motion of the attorney for the Government, may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(b) If the issue of insanity is raised by notice as provided in rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty by reason of insanity.

"§ 4243. Hospitalization of a person found not guilty by reason of insanity

"(a) If a person is found not guilty by reason of insanity, the court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another. The court may make any order reasonably necessary to secure the appearance of the person at the hearing.

"(b) Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) If, after the hearing, the court finds by a preponderance of the evidence that a person found not guilty by reason of insanity is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled if such State will assume responsibility for his care, custody, and treatment. If such State will not then assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until such State will assume such responsibility or until the person's mental condition is so improved that his release would not create a substantial danger to himself or to the person or property of another.

"(e) When the director of the facility in which a person found not guilty by reason of insanity is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial danger to himself or to the person or property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial danger to himself or to the person or property of another, the court shall order his immediate discharge.

"§ 4244. Hospitalization of a convicted person suffering from mental disease or defect

"(a) A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, file a motion for a hearing on the present mental condition of the defendant. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody, care, or treatment in a mental hospital.

"(b) Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c). In addition to the information required to be included in the psychiatric report pursuant to the provisions of section 4247(c), if the report includes an opinion by the psychiatrists that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody, care, or treatment in a mental hospital, the report shall also include an opinion by the psychiatrists concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

"(c) The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) If, after the hearing, the court is of the opinion that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to probation or imprisonment, be committed to a mental hospital for custody, care, or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable mental hospital, or in another facility designated by the court as suitable. Such a commitment constitutes a provisional sentence to the maximum term authorized for the offense of which the defendant was found guilty.

"(e) When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody, care, or treatment in a mental hospital, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether the provisional sentence should be reduced. After the hearing, the court may order that the defendant be released, be placed on probation, or be imprisoned for the remainder of the sentence or for any lesser term.

"§ 4245. Hospitalization of an imprisoned person suffering from mental disease or defect

"(a) A defendant serving a sentence of imprisonment, or an attorney for the Government at the request of the director of the facility in which the defendant is imprisoned may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court shall grant the motion if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody, care, or treatment in a mental hospital. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

"(b) Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) If, after the hearing, the court is of the opinion that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody, care, or treatment in a mental hospital, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until he is no longer in need of custody, care, or treatment in a mental hospital or until the expiration of his sentence of imprisonment.

"(e) When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody, care, or treatment in a mental hospital, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the sentence imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned.

"§ 4246. Hospitalization of a person due for release but suffering from mental disease or defect

"(a) If the director of a facility in which a person is hospitalized pursuant to this chapter certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dropped, is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another, and that suitable arrangements for the custody and care of the person are not otherwise available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

"(b) Prior to the date of the hearing, the court may order that, a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled if such State will assume responsibility for his care, custody, and treatment. If such State will not then assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until such State will assume such responsibility or until the person's mental condition is so improved that his release would not create a substantial danger to himself or to the person or property of another.

"(e) When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial danger to himself or to the person or property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial danger to himself or to the person or property of another, the court shall order his immediate discharge.

"§ 4247. General provisions for chapter 313

"(a) As used in this chapter—

"(1) 'insanity' means a mental disease or defect as a result of which a person lacked the state of mind required as an element of the offense charged; and

"(2) 'mental disease or defect' means an impairment of mental functions sufficient to render a person incapable of either distinguishing right from wrong, or of conforming his conduct to the requirements of the law.

"(b) A psychiatric examination ordered pursuant to this chapter shall be conducted by at least two qualified psychiatrists. The psychiatrists shall be—

"(1) designated by the court if the examination is ordered under section 4241, 4242, 4243, or 4244; or

"(2) designated by the court, and shall include one psychiatrist selected by the defendant, if the examination is ordered under section 4245 or 4246.

For the purpose of an examination pursuant to an order under section 4241, 4242, 4243, or 4244, the court may commit the person to be examined for a reasonable period, but not more than sixty days, to the custody of the Attorney

General for placement in a suitable mental hospital or another facility designated by the court as suitable.

"(c) A psychiatric report ordered pursuant to this chapter shall be prepared by the psychiatrists designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

"(1) the person's history and present symptoms;

"(2) a description of the psychological and medical tests employed and their results;

"(3) the psychiatrists' findings; and

"(4) the psychiatrists' opinions as to diagnosis, prognosis, and—

"(A) if the examination is ordered under section 4241, whether the person is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

"(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

"(C) if the examination is ordered under section 4243 or 4246, whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial danger to himself or to the person or property of another; or

"(D) if the examination is ordered under section 4244 or 4245, whether the person is presently suffering from a mental disease or defect as a result of which he is in need of custody, care, or treatment in a mental hospital.

"(d) At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him. The person shall be afforded an opportunity to testify, to present evidence, to subpena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) The director of the facility in which a person is hospitalized pursuant to—

"(1) section 4241 shall prepare semiannual reports; or

"(2) section 4243, 4244, 4245, or 4246 shall prepare annual reports;

concerning the mental condition of the person and recommendations concerning his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

"(f) Statements made by the defendant during the course of a psychiatric examination pursuant to section 4241 or 4242 are not admissible as evidence against the accused upon any issue except the issue of the presence or absence of a mental disease or defect which is claimed by the defendant to have negated the mental state required for the commission of any crime charged.

"(g) Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus his eligibility for release under such sections.

"(h) The Attorney General—

"(1) may contract with a State, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

"(2) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246; and

"(3) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter.".

(b) The first sentence of paragraph (a) of rule 12 of the Federal Rules of Criminal Procedure is amended by adding after "not guilty" the following: ", not guilty by reason of insanity".

(c) Rule 12 is further amended by adding at the end thereof the following new paragraph:

"(i) The plea of not guilty by reason of insanity shall be entered pursuant to rule 12.2.".

(d) Rule 12.2 of the Federal Rules of Criminal Procedure is amended to read as follows:

"Rule 12.2.—Notice of Plea of Not Guilty by Reason of Insanity

"(a) If a defendant intends to rely upon the plea of not guilty by reason of insanity, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this paragraph, the plea of not guilty by reason of insanity may not be entered. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

"(b) If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the state of mind required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

"(c) In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination as provided in section 4242 of title 18, United States Code, by at least two qualified psychiatrists designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on any issue raised in such criminal proceeding, except the issue of whether or not the defendant suffered from a mental disease or defect which negated the intent required for the commission of the offense charged.

"(d) If there is a failure to give notice when required by paragraph (b) or to submit to an examination when ordered under paragraph (c), the court may exclude the testimony of any expert witness offered by the defendant on the issue of his state of mind.

"(e) A defendant is not guilty by reason of insanity if his actions constitute all necessary elements of the offense charged other than the requisite state of mind, and he lacked the requisite state of mind as a result of mental disease or defect.".

DEPARTMENT OF JUSTICE INTERNAL OPERATING PROCEDURES

SEC. 7. (a) Section 533 of title 28, United States Code, is amended—

(1) in the section heading by inserting before the period the following: "; investigative guidelines";

(2) by inserting "(a)" before "The Attorney General"; and

(3) by adding at the end thereof the following:

"(b) The Attorney General may issue departmental policies, guidelines, and regulations concerning the investigation and prosecution of criminal cases and related law enforcement matters that shall be followed by every Federal law enforcement officer, as defined by section 111 of title 18. Nothing in any policies, guidelines, or regulations so promulgated shall create any substantive or procedural right inhering to the benefit of any individual, and no court shall have jurisdiction over a claim in any proceeding, including a motion to quash a subpena, suppress evidence, or dismiss an indictment, based solely on an alleged failure to follow such policies, guidelines, or regulations as may be promulgated by the Attorney General.".

(b) The section analysis of chapter 33 of title 28, United States Code, is amended by inserting before the period the following: "; investigative guidelines" at the end of the item relating to section 533.

SPECIAL PROSECUTOR

SEC. 8. (a) Chapter 39 of title 28 of the United States Code is amended—

(1) in section 591(a) by deleting "petty offense" which appear at the end of such section and inserting in lieu thereof the following: ", misdemeanor or petty offense"; and

(2) in section 592 by striking out all the material following subsection (a) and inserting in lieu thereof the following:

"(b)(1) If the Attorney General, upon completion of the preliminary investigation, finds that there is not probable cause to believe that conduct of the type described in subsection (a) of this section has been, or is being engaged in, he shall so notify the party or parties who provided the information forming the basis for the investigation as well as any individual who was a subject of such investigation. A record of every such allegation of official misconduct, and all information developed in the investigation of such allegation, together with a memorandum containing a summary of the information received and a summary of the results of the investigation conducted, shall be kept in the permanent records of the Department of Justice and such information shall not be revealed to any other individual outside the Department of Justice without consent of the Office of the Attorney General, or upon order of a court of appropriate jurisdiction.

"(2) If the Attorney General, upon completion of the preliminary investigation, finds that there is probable cause warranting further investigation or prosecution of persons alleged to have engaged in conduct described in section 591(a) of this title, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that the matter is so unsubstantiated as not to warrant further investigation or prosecution, then the Attorney General shall appoint a special prosecutor. The Attorney General shall define the prosecutorial jurisdiction of the office of such special prosecutor by and through such letters of appointment as may be issued, and shall provide notice of the appointment of such prosecutor and the extent of such prosecutorial jurisdiction to such parties, if any, as have made allegations of official misconduct.

"(3) If—

"(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional specific information about the matter to which the memorandum related; and

"(B) the Attorney General determines after such additional investigation as he may deem appropriate, that such information warrants further investigation or prosecution,

then the Attorney General shall, not later than ninety days after receiving such additional information, appoint a special prosecutor in accordance with the provisions of subsection (b)(2) of this section.

"(c) The Attorney General may require a special prosecutor appointed under the provisions of this section to accept referral of any matter that relates to a matter within that special prosecutor's prosecutorial jurisdiction.

"(d) The Attorney General's determination under subsection (b) of this section to appoint a special prosecutor shall not be reviewable in any court.".

(b) Section 593 of title 28, United States Code, is hereby repealed.

(c) Section 594(e) of title 28, United States Code, is amended—

(1) by striking out "or the division of the court" after "Attorney General" in the first sentence of such subsection; and

(2) by striking out "as established by the division of the court".

(d) Section 595(b) of title 28, United States Code, is amended—

(1) in paragraph (1) by striking out "division of the court" and inserting in lieu thereof "Attorney General";

(2) in paragraph (3)—

(A) by striking out all material which follows the first sentence and inserting in lieu thereof the following: "Any disclosure of matters occurring before a grand jury shall be in accordance with the provisions of rule 6(e) of the Federal Rules of Criminal Procedure.";

(B) by striking out "The division of the court" and inserting in lieu thereof "The Attorney General"; and

(C) by striking out "the division deems" and inserting in lieu thereof "the Attorney General deems".

(e) Section 595(e) of title 28, United States Code, is amended by—

(1) striking out the first sentence and inserting in lieu thereof: "A majority of the majority party members, or a majority of all nonmajority party members of the Committee on the Judiciary of either the House of Representatives or the Senate may request in writing that the Attorney General appoint a special prosecutor."; and

(2) striking out the second sentence and inserting in lieu thereof the following: "Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request, and if no appointment has been made, why such appointment was not made.".

(f) Section 596(a) of title 28, United States Code, is amended—

(1) in paragraph (1) by inserting after "only for extraordinary impropriety" the following: "constituting an act of moral turpitude or bad faith execution of such special prosecutor's responsibilities,";

(2) in paragraph (2) by striking out all material which appears after "publishing any or all of the report."; and

(3) in paragraph (3) by striking out "division of the court" each place it appears and inserting in lieu thereof the following: "appropriate Federal court,".

(g) Section 596(b) of title 28, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking out "An" and inserting in lieu thereof "The"; and

(B) by inserting "a" before "special prosecutor" each place it appears; and

(2) in paragraph (2)—

(A) by striking out "The division of the court, either on its own motion or upon suggestion of the" and inserting in lieu thereof "The";

(B) by striking out "terminate an" and inserting in lieu thereof "terminate the"; and

(C) by inserting "a" after "office of".

(h) Section 597 of title 28, United States Code, is amended by inserting at the end thereof the following: "Upon the appointment of a special prosecutor, the Attorney General, and all officers and employees of the Department of Justice, shall deliver to such special prosecutor as soon as is practical all information or materials within their knowledge or possession concerning the matters which are within the special prosecutor's jurisdiction.".

(i) Section 49 of title 28, United States Code, is hereby repealed.

HABEAS CORPUS

SEC. 9. (a) Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, if the Federal question presented was properly presented under State law in the State court proceedings both at trial and on direct appeal, or properly presented in a collateral proceeding and disposed of exclusively on the merits, the claim may not be considered or determined by a judge or court of the United States, unless the petitioner establishes that he is in custody in violation of the Constitution or laws of the United States, that the alleged violation is of a Federal right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal, and was prejudicial to the petitioner as to his guilt or punishment; and that the claimed constitutional or statutory violation presents a substantial question—

"(1) which was not theretofore raised and determined, and

"(2) which there was no fair and adequate opportunity theretofore to raise and have determined.

"(e) No petition filed in behalf of a person in custody pursuant to the judgment of a State court shall be considered or determined by a judge or court of the United States if it is not filed within three years from the date the State court judgment and sentence became final under State law, unless the Federal right asserted did not exist at the time of the State court trial and that right has been determined to be retroactive, or the violation of an existing right was not, and could not have been (in the exercise of reasonable diligence) known to the petitioner within three years after the date the judgment and sentence became final under State law. In such case, the petition may be entertained within three years from the date said violation or right was determined to exist.".

(b) Section 2254(d) of title 28, United States Code, is amended to read as follows:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination, after a hearing, on the merits of a factual issue, which is made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, which determination is evidenced by written findings, opinion, or other reliable and adequate written indicia, shall not be redetermined or relitigated by a judge or court of the United States, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not addressed in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts could not be developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; or

"(6) that unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that there is no evidence to support such finding.

No evidentiary hearing may be conducted in the Federal court when the State court records demonstrate the factual issue was litigated and determined, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (6), inclusive, is shown by the applicant. The Federal court may further designate a United States magistrate to consider the motion in the first instance and prepare a statement of facts and proposed findings of law and fact for the court hearing the petition to consider in issuing a final determination upon the motion.".

(c) Section 2255 of title 28, United States Code, is amended to read as follows:

"§ 2255. Federal custody; remedies on motion attacking sentence

"(a) A prisoner in custody under a sentence imposed by a court established by an Act of Congress may move such court to vacate, set aside, or correct the sentence, if—

"(1)(A) he is in custody in violation of the Constitution of the United States,

"(B) the claimed constitutional violation presents a substantial question—

"(i) which was not theretofore raised and determined, and

"(ii) which there was no fair and adequate opportunity theretofore to raise and have determined, and

"(C) the claimed constitutional violation is of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction, and was prejudicial to the petitioner as to his guilt or punishment;

"(2) he is in custody in violation of the laws of the United States;

"(3) the sentence was imposed in violation of the laws of the United States;

"(4) the court was without jurisdiction to impose such sentence; or

"(5) the sentence is otherwise subject to collateral attack.

"(b) A motion for such relief may be made at any time within three years after a conviction is final, or within three years after the discovery of error providing the basis for the requested relief, which error was not, and could not (in the exercise of reasonable deligence) have been known to the petitioner within three years after the date the conviction became final or within three years after the rendition of a decision regarding matters of law affecting the conviction from which relief is sought.

"(c) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been a denial or infringement of the constitutional rights of the prisoner as described in subsection (a) of this section, the court shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence as may appear appropriate.

"(d) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The court may further designate a United States magistrate to consider the motion in the first instance and prepare a statement of facts and proposed findings of law and fact for the court which imposed the sentence (or other court reviewing the matter) to consider in issuing a final determination upon the motion.

"(e) The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"(f) An appeal may be taken to the court of appeals from the order entered on the motion in accordance with section 2253 of this title.

"(g) An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him or that such court has denied him the relief sought, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.".

JUVENILE CRIME

SEC. 10. Section 5032 of title 18, United States Code, is amended to read as follows:

"§5032. Delinquency proceedings in district courts: Treatment of juveniles as adults for purposes of criminal prosecution

"(a) A juvenile alleged to have committed an act of juvenile delinquency which if committed by an adult would be a felony shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to an appropriate district court of the United

States that the juvenile court or other appropriate district court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles, or (3) that the offense charged, if committed by an adult, would be a felony punishable by a maximum penalty of five years imprisonment or more, and there is a special interest warranting Federal prosecution. If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State.

"(b) If an alleged juvenile delinquent is not surrendered to the authorities of a State or the District of Columbia pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

"(c) A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile sixteen years and older alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice. In such cases, the juvenile shall be considered an adult for purposes of prosecution and disposition except that no juvenile convicted as an adult shall be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges.

"(d) Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the nature of past treatment efforts and the juvenile's response to such efforts; and whether juvenile disposition will reflect the seriousness of the juvenile's conduct, promote respect for the law, promote the protection of the public from the juvenile's conduct, and provide a just response to the conduct of the juvenile.

"(e) Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings.

"(f) Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

"(g) Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.".

FREEDOM OF INFORMATION ACT

SEC. 11. (a) Section 552(a) of title 5, United States Code, is amended—

(1) by striking out the material before clause (1) and inserting in lieu thereof the following:

"(a) Each agency shall make available to any United States person the following information:";

(2) in paragraph (3) by inserting before the period at the end thereof the following: ": *Provided, however,*

That this section shall not be construed to require a law enforcement or national security intelligence agency to disclose information to any person requesting such disclosure on behalf of an individual who is not a United States person as defined in this section";

(3) in paragraph (4)(B) by inserting before the period the following: ", but if the court examines the contents of a law enforcement or national intelligence agency's records withheld by the agency pursuant to subsection (b)(1), (b)(3), or (b)(7), the examination shall be in camera. The court shall maintain under seal any affidavit submitted by a law enforcement or intelligence agency to the court in camera";

(4) in paragraph (6)(A) by striking out clause (i) and inserting in lieu thereof the following:

"(i) notify the person making the request of the receipt of the request and notify such person within thirty days after the receipt of such request of the number of pages encompassed by the request and the time limits imposed by this subsection upon the agency for responding to the request; determine whether to comply with the request and notify the person making the request of such determination and the reasons therefor within sixty days after the receipt of such request (excepting Saturdays, Sundays, and legal public holidays) if the request encompasses less than two hundred pages of records with an additional sixty days permitted for each additional two hundred pages of records encompassed by the request, but all determinations and notifications shall be made within one year; and notify the person making the request of the right of such person to appeal to the head of the agency an adverse determination; and"; and

(5) in paragraph (6)(C)—

(A) by striking out "in responding to" and inserting in lieu thereof "in attempting to respond to"; and

(B) by inserting "shall" before "allow".

(b) Section 552(b) of title 5, United States Code, is amended—

(1) in paragraph (2) by adding ", including such materials as (A) manuals and instructions to investigators, inspectors, auditors, and negotiators, and (B) examination material used solely to determine individual qualifications for employment, promotion, and licensing" after "agency";

(2) by amending paragraph (6) to read as follows:

"(6) records or information concerning individuals the release of which would constitute an unwarranted invasion of personal privacy, including compilations or lists of names and addresses of agency personnel;";

(3) in paragraph (7)—

(A) in the introductory language—

(i) by striking out "investigatory records" and inserting in lieu thereof "records or information"; and

(ii) by adding "or information" after "such records";

(B) by amending subparagraph (A) to read as follows:

"(A) reveal investigatory information relating to an ongoing investigation or enforcement proceeding,";

(C) by amending subclauses (D), (E), and (F) to read as follows: "(D) tend to disclose the identity of a confidential source, including any foreign, State, or other public agency or authority or any private institution that furnished information on a confidential basis; and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (E) disclose techniques, procedures, guidelines, or priorities for law enforcement investigations or prosecutions; (F) endanger the life or physical safety of any natural person; or"; and

(D) by adding the following new subclause at the end thereof: "(G) disclose information relating to such categories of investigations of terrorism, organized crime, or foreign counterintelligence as are exempted by the Attorney General by regulation or order;"; and

(4) by striking out all the material after paragraph (9) and inserting in lieu thereof the following:

"Any reasonably segregable portion of a record not already in the public domain which contains information pertaining to the subject of a request shall be provided to any person properly requesting such record after the portions which are exempt under this subsection have been deleted. Each agency which carries out law enforcement or national security intelligence functions shall prepare and furnish the same general standardized written response for issuance to any person making a request for records under this section to be used both in cases where the agency does not have the records requested and in cases where the records are protected from disclosure because disclosure would reveal that a criminal investigation concerning the person is in progress.".

(c) Section 552(d) of title 5, United States Code, is amended—

(1) by striking out "March 1" each place it appears and inserting in lieu thereof "December 1", and

(2) by striking out "prior calendar year" in the material following paragraph (7) and inserting in lieu thereof "prior fiscal year".

(d) Subsection (e) is amended to read as follows:

"(e) For purposes of this section—

"(1) the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) the term 'foreign intelligence' means information relating to the capabilities, intentions, and activities of foreign powers, organizations, or persons;

"(3) the term 'foreign counterintelligence' means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations, or persons;

"(4) the term 'terrorism' means any activity that involves a violent act that results in or risks serious bodily harm to any individual or aggravated property destruction and that is done for the purpose of—

"(A) intimidating or coercing the civil population or any segment thereof;

"(B) influencing or retaliating against the policies or actions of the Government of the United States or of any State or political subdivision thereof or of any foreign state; or

"(C) influencing or retaliating against the trade or economic policies or actions of a corporation or other entity engaged in foreign commerce;

"(5) the term 'organized crime' means criminal activity by two or more persons who are engaged in a continuing enterprise for the purpose of obtaining monetary or commercial gains or profits wholly or in part through racketeering activity as defined in section 1961 of title 18, United States Code;

"(6) the terms 'law enforcement agency' and 'national security intelligence agency' for the purposes of this section shall mean—

"(A) those divisions of the Department of Justice which have responsibility for criminal law enforcement, foreign intelligence, and foreign counterintelligence investigations and prosecutions; the Secret Service and Alcohol, Tobacco, and Firearms Division of the Department of the Treasury; the Central Intelligence Agency; the Defense Intelligence Agency; any foreign intelligence component of the Department of Defense; and

"(B) any agency, not listed in subsection (e)(6)(A) above, which may be designated by the Congress as one having investigatory responsibilities in the areas of criminal law enforcement, foreign intelligence, or foreign counterintelligence; and

"(7) the term 'United States person' means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(20)), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is domiciled in the United States; but such term shall not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a)).".

○

Senator SPECTER. We will now call the jurors: Mr. Lawrence Coffey, Ms. Nathalia Brown, Mr. Woodrow Johnson, Mr. Glynis Lassiter, and Ms. Maryland Copelin.

Welcome, ladies and gentlemen.

STATEMENTS OF A PANEL CONSISTING OF: LAWRENCE COFFEY, MS. NATHALIA BROWN, WOODROW JOHNSON, GLYNIS LASSITER, AND MS. MARYLAND COPELIN

Senator SPECTER. Ladies and gentlemen, I would like to repeat at this time what I have said to you in the anteroom shortly before 9:30 and some of the comments which I made by way of brief introduction before the proceedings started.

The subcommittee approaches this hearing and the effort to obtain from you the processes by which you arrived at the verdict in terms of understanding the substantive law on insanity and the burden of proof. We approach these questions with sensitivity. We have a concern about questioning jurors after a case has been concluded, but the law is that a juror may appropriately be questioned about the activities which he or she has had in the jury room; a juror is under no responsibility or obligation to answer any question, just as no citizen is under any obligation to answer any question put to him under any circumstance unless he is present under compulsory process such as a subpena.

So, as you ladies and gentlemen know, you are here voluntarily. We asked you if you would come forward, and you have done so on a voluntary basis. Any questions or discussions which are put to you will be done so with the understanding that you should feel free to decline to respond to any question where you would prefer not to respond, where you are uncomfortable to any extent whatsoever. We do not want to trespass on your feelings or on the sanctity of the jury process.

Early this morning Senator Baucus, who is a member of this subcommittee, had called me. Senator Baucus expects to be here and expressed some concern about questioning jurors. Senator Metzenbaum has raised the question as well. Senator Metzenbaum has advised that Senator Leahy has expressed some concern. And I, too, have a concern and have discussed it with my staff and considered the issue and have had experience during my tenure as district attorney of Philadelphia on the issue of the propriety of questioning jurors after a verdict was in. It is, as I said before, a lawful and a proper thing to do.

It has been the practice widespread in this country for many, many years for jurors to be questioned by the media because there is intense public interest in what happened to lead to a decision in a given case.

It is my own view, which I expressed to you ladies and gentlemen in the anteroom, that you are performing a real public service in coming forward because it is up to the Congress to deal with the issues which are posed on the defense of insanity. In the 200-year history of the U.S. Congress, there has never been any legislation on this subject. So, the way we can deal with it in a most direct manner, in my judgment, is to deal with the people who have had the experience most recently coming to grips with these issues.

We humans tend to forget rather rapidly. As I say, one of the purposes of convening this hearing at an early date is because the verdict was rendered on Monday of this week and this is Thursday morning. This is as fast as we could put the wheels in motion to convene this hearing.

We do feel that you are performing a public service by sharing with us your experience to help us for the future. We do not intend by this proceeding to have a chilling effect on juries of the future. And I think it should not be regarded as such any more than a newspaper person or television or radio reporter asking a juror a question and publishing a comment because the jurors there are free to decline to respond, just as you are free here to decline to respond.

It is my judgment at least that the advantage to the Congress in having this kind of an inquiry is very, very substantial and far outweighs any problem of imposing upon the jurors. Too often in the law, we deal with problems in an indirect way without confronting directly those who know and those who have the greatest experience to have an understanding as to what has happened as a guide for the future.

That is my view based on the experience I have had. Senator Metzenbaum, would you care to supplement that?

Senator METZENBAUM. Yes. I would just want to be certain that none of the jurors feel any sense of compulsion in being here or even any sense of embarrassment. I think we ought to make it very clear that there are instances in which a Senate committee requests, in some instances orders, witnesses to testify. In this instance there is none of that present whatsoever. If any of you prefer not to testify or get any sense of embarrassment or would prefer to leave the room or walk out without having said anything, you have every right to do so. This Senate committee really has no special prerogatives with respect to directing you to respond or even bringing any kind of pressure upon you to respond.

So, I just wanted to be certain that all of you are here because you want to be here and you are totally comfortable in responding to this committee's questions. If not, I think that I would be speaking for the chairman in saying that you are perfectly at liberty either to fail to respond or to leave the room. And there would be no further comment by this committee.

Senator SPECTER. I would supplement that by saying if you have any question at any time, feel free to ask it if there is anything that you find confusing or anything that you would like clarification on.

All right. Welcome, Mr. Lassiter, Mr. Coffey, Mr. Johnson, Ms. Copelin, and Ms. Brown.

Beginning with the substantive law on insanity, this is the first issue which the subcommittee is going to inquire into. It has been developing since the *M'Naghten* case in 1843 on right and wrong through to the instruction which Judge Parker gave you in the trial. In a moment I am going to repeat that.

The first line of inquiry will be what you understood by this complex legal definition in terms of the definition itself without the application of the psychiatric evidence which we are going to come to in short order. Following the description and the examination of

Judge Parker's charge on the current law in insanity, we will take up other definitions of insanity which have been proposed, such as in Senator Zorinsky's bill, Senator Hatch's bill, in my bill, and in the other legislation, in an effort to see if by changing the substantive definition it would make a difference in how the verdict would be returned.

The definition which Judge Parker gave you is this:

> The law provides that a jury shall bring in a verdict of not guilty by reason of insanity if at the time of the criminal conduct the defendant as a result of mental disease or defect either lacked substantial capacity to conform his conduct to the requirements of the law or lacked substantial capacity to appreciate the wrongfulness of his conduct.

That is quite a definition. Mr. Lassiter, let us begin with you. You are in the corner. First of all, when that definition was given to you in the course of the trial with the other supplementary instructions, did you feel that you had a reasonably clear understanding of what the law on insanity was?

Mr. LASSITER. Yes, I thought I did.

Senator SPECTER. By way of following up, Mr. Lassiter, what did you understand to be the meaning of the terms mental disease or defect?

Mr. LASSITER. Well, I understood it to be some kind of problem that he had, not exactly insane but a thing just something that was bothering him that he could not control.

Senator SPECTER. Some kind of a problem not necessarily insane? If you take a microphone, I think we could hear you just a little bit better.

As I heard you, you say some kind of a problem, not necessarily insane? Did you say the word impulse?

Mr. LASSITER. Yes, I think he had a mental problem.

Senator SPECTER. Some kind of problem?

Mr. LASSITER. Right, mental problem.

Senator SPECTER. And when you come to the terms like lack substantial capacity to conform his conduct to the requirements of the law or lack substantial capacity to appreciate the wrongfulness of his conduct, what did you understand by language like lack substantial capacity?

Mr. LASSITER. I think, I think that was he able to know what he was doing at the time. I think at that specific time that he didn't.

Senator SPECTER. Able to know what he was doing.

Mr. LASSITER. Able not to know.

Senator SPECTER. You say not to know.

Mr. LASSITER. Right.

Senator SPECTER. And did you then conclude that he was not able to know what he was doing at the time he did it?

Mr. LASSITER. At that particular time.

Senator SPECTER. You think he did not know——

Mr. LASSITER. Did not.

Senator SPECTER [continuing]. What he was doing.

Mr. LASSITER. Right.

Senator SPECTER. Mr. Coffey, if we may turn to you. When that definition was given to you by the presiding judge, did you feel that you had a reasonably clear understanding of what the substantive law of insanity was?

Mr. **Coffey**. Yes, I did.

Senator **Specter**. And what did you understand it to be?

Mr. **Coffey**. That insanity was like he could not control his conduct because of some mental problem.

Senator **Specter**. Could not control his conduct because of some mental problem.

So, you concluded that he was actually out of control then——

Mr. **Coffey**. Yes.

Senator **Specter** [continuing]. In coming to that conclusion.

Mr. **Coffey**. Right.

Senator **Specter**. When you say because of some mental problem, could you elaborate any further as to what kind of a mental problem you thought had to be present in order to conclude that he was not sane?

Mr. **Coffey**. Can you put that question to me again?

Senator **Specter**. When you say some kind of a mental problem, you heard a lot of testimony about a variety of mental problems. You heard the term schizophrenia. You heard the term psychosis. You heard the term defect. You heard the term legal insanity. And I am just wondering if you could amplify in any way—you used the word some kind of a mental problem. That is what you thought that the definition required. My question to you is whether you could be a little more expansive on what kind of a mental problem you thought he had to have.

Mr. **Coffey**. He had some type of mental problem. I cannot specifically say which kind, but a mental problem that he could not control himself according to the law.

Senator **Specter**. Some kind of a mental problem that he could not control.

Mr. **Coffey**. He could not control himself, that is right.

Senator **Specter**. Mr. Johnson, the same question: What did you understand that definition to mean?

Mr. **Johnson**. I thought the definition was at the time did he understand the requirement of the law when he did it.

Senator **Specter**. He did not understand the requirements of the law?

Mr. **Johnson**. Did he understand it.

And I would like to say I do believe that he did have a mental problem.

Senator **Specter**. Could you pull the microphone a little closer? You do believe he did what?

Mr. **Johnson**. I believe he did have a mental problem. I think he was a little mixed up. I would say one of the things that the doctor mentioned, maybe he had a mixed personality.

Senator **Specter**. Could you repeat that last answer?

Mr. **Johnson**. I would say, quote behind one of the doctors, I would think maybe he had some type of mixed personality.

Senator **Specter**. Of a mixed personality? You are referring to schizophrenia, split personality?

Mr. **Johnson**. That is correct.

Senator **Specter**. When you say you understood that he did not understand the requirements of the law, by that do you mean that he did not understand that the requirements of the law were that one man could not shoot at another man?

Senator Metzenbaum reminds me that you have to respond for the record. You have to say yes if your answer is yes.

Mr. JOHNSON. Would you repeat——

Senator SPECTER. The question was that you say that he did not understand the requirements of the law and by that you mean that he did not understand that the law prohibited one man from shooting a gun at another man.

Mr. JOHNSON. When I say he did not?

Senator SPECTER. Yes.

Do you think that the defendant did not understand the requirement of the law which says one man may not shoot a gun at another man?

Mr. JOHNSON. I don't think I want to answer that because I——

Senator SPECTER. That is fine, Mr. Johnson.

Mr. JOHNSON [continuing]. Because I do not believe nobody knows what he was thinking that day.

Senator SPECTER. Excuse me?

Mr. JOHNSON. I do not think I want to answer that because I do not think nobody knows what was within his head that day. Maybe if someone had ask John Hinckley did he understand the capacity to the requirement of the law, he may have said yes. But how could anybody tell on that day, and at the time that he did.

Senator SPECTER. Nobody knows what was in his head that day.

Ms. Copelin, did you understand that definition with reasonable clarity when the trial judge instructed you on what was the law on sanity and insanity?

Ms. COPELIN. I believe I did.

Senator SPECTER. What did you understand it to mean?

Ms. COPELIN. It was a mental disorder a person has and if he is going to take the mental part of it. If he is going to use the mental verdict of it.

Senator SPECTER. Could you pull the microphone a little closer to you please?

Ms. COPELIN. If you are going to use the mental verdict, it would have to be a disorder, a mental disorder or disturbance.

Senator SPECTER. A mental disorder or disturbance.

Ms. COPELIN. Yes, some type of mental problem must be there.

Senator SPECTER. When you say some type, Ms. Copelin, do you mean just any type?

Ms. COPELIN. No. I cannot be sure of what kind I would say for the simple reason I do not know to what degree or what type because a person has a mental illness can pose one way one time and change and be another thing at another time. So, you really do not know to what extent that you can say it because you cannot pinpoint it. There is no way you can pinpoint mental illness to that effect.

Senator SPECTER. You say you cannot pinpoint it.

Ms. COPELIN. You cannot pinpoint. You know a person has a disturbance or has an illness. But you cannot say to what degree it is, not a layman, not me anyway. You just cannot pinpoint it because at one time they are saying or doing one thing and another time they are doing something altogether different.

One time maybe you could say well, OK, I know this person is sick. And the next 5 or 10 minutes or the next moment they can change altogether. But it is still mental illness. You cannot prove they are not mentally ill. And you cannot prove they are completely sane.

Senator SPECTER. Well, when you say that you cannot pinpoint mental illness, you cannot say to what degree——

Ms. COPELIN. To what degree, that's it.

Senator SPECTER. Did you have any understanding as to what degree a person had to be mentally disturbed in order not to be responsible for his conduct?

Ms. COPELIN. I do not know to what degree.

Senator SPECTER. When you say that you do not know to what degree, then how did you approach the decision as to whether he was or was not sane?

Ms. COPELIN. The evidence. We had evidence. We had the testimonies of the psychiatrists. And the evidence and facts were there for us. We used them. And we read. We watched the pictures and so forth. Everything was there. To me, we exercised everything.

We went in and we argued. We knew that the gentleman was guilty of his act, but we also knew there was a mental problem. But we could not do any better than what we did on account of your forms.

Senator SPECTER. On account of what?

Ms. COPELIN. The form.

Senator SPECTER. The form?

Ms. COPELIN. The form. You know, the forms where you have guilty, not guilty.

Senator SPECTER. Would you have liked to have had some different——

Ms. COPELIN. Yes.

Senator SPECTER [continuing]. Options on the form?

Ms. COPELIN. Definitely.

Senator SPECTER. What option would you have liked to have had on the form?

Ms. COPELIN. I cannot word the way it possibly should be, but I can state what I think it should be able to include.

Senator SPECTER. Go ahead.

Ms. COPELIN. I think it should be another place or space where instead of just using the three that, if a person is guilty of the crime and is mentally ill, that they should be—or vice versa, whichever way you want to put it—mentally ill and have committed a crime, they should be treated for the illness. And after or even during the time of treatment if a soul can be in a hospital prison like atmosphere, be it. And if not, if they have to be hospitalized, hospitalize them. And then after that, let them get the punishment for the crime they committed.

Senator SPECTER. So, you are suggesting that, if they are guilty but insane that they ought to be detained for a long period of time even though you decided that they were insane at the time?

Ms. COPELIN. Yes. I think they should get the help that they need and also punishment for the act they did.

Senator SPECTER. Ms. Brown, did you feel that you understood the definition of insanity under the legal terms?

Ms. BROWN. Well, tuning in on the defect, I figure if something is defect, that something has been taken away, OK. Mr. Hinckley, if he had a defect, how can he not know what went on March 30, and then later on he has his capacity back? I figure if you are insane to this degree, you should still be insane afterward. And the way he appeared to me, that he had all his faculties then and even during the trial.

Now, he has some mental disorder but it was not to the degree that he did not know what was going on.

Senator **Specter**. You felt he did know what was going on?

Ms. **Brown**. Yes. Because when he wrote his letter, as they call the Jodie letter, he stated what he was going to do, and he knew that he could be killed or shot. If he knew this, he had to know what was going on.

But then I look at it this way. There has never been an assassin shot in a crowd. They always have been captured. So, he knew this. And he didn't mail the letter because of the fact if the setup wasn't right, he could go back and retrieve the letter.

So, I feel he knew what he was doing.

But like the media, I was reading some things. They state that I was pressured by the jurors. I was not pressured by the jurors because they had a right to their opinion, just like I did mine. I am the one that gave in. That is one reason why I came forward because I had to be at peace of mind with myself. It is just the pressure of the trial, of the sequestration, of arguing something that all the psychiatrists could not pinpoint. None of them had the same conclusion. All of them said he had this illness, that illness. So, how are we to know what illness he has? It was just laid in our lap to decide whether this guy is insane or if he is sane.

Even if he had this mental ability, what he should have been guilty by reason of insanity and then treat him and let him pay for his crime.

Senator **Specter**. Do you think that, if he had been found guilty by reason of insanity, he should then have had to pay for his crime?

Ms. **Brown**. Yes.

Senator **Specter**. So, even if you concluded that he was insane, you still believe he should have paid a penalty for a crime?

Ms. **Brown**. Well, insane is a word that—it is hard to figure out. OK, you have got your legal insanity. Then you have got your lay insanity. We can say insane and think of somebody being crazy. But the legal insanity, how far does that go? We really do not know as lay witnesses.

Senator **Specter**. You say legal insanity, how far does it go, you really do not know?

Ms. **Brown**. Yes.

Senator **Specter**. You say that you came forward today because you wanted to speak up yourself——

Ms. **Brown**. Yes.

Senator **Specter** [continuing]. On the question of the pressure. So, you view this hearing as an opportunity for your own expression of your view as to why you did what you did?

Ms. **Brown**. Not just for my views but just the system. They lay this in our laps. And the people are looking down on the jurors. They do not realize what it means to be a juror in this type of case. They do not know the different pressures of being away from your family. They sit and tell us: Hinckley, he's out here playing, he's locked up playing Ping-pong, what a good basketball player he is. Here we are incarcerated by justice trying to figure out what his outcome is going to be. Those pressures.

I had all the opportunity to try to prove to the other jurors that he was sane. But the prosecution could not do it, how am I going to do it? I got 10 other people to try to prove that he is sane. We went through all the evidence. Here the evidence shows he had a mental disorder. But he contradicted himself so much and made fools of a lot of psychiatrists. How were we really tc pinpoint what was his problem?

And then for our own mental state we had to think about that, too. I felt that I was on the brink of insanity myself going through this, you know.

Senator **Specter**. My approach, my fellow Senators, would be to explore the issue of the legal standard of insanity and then have another round on the burden of proof issue and then another round on the various standards, other standards. But however anybody wants to proceed, I would defer now to Senator Metzenbaum.

Senator **Metzenbaum**. That is perfectly agreeable with me. I am still a little bit troubled about this entire hearing. I do want the jurors to understand, and I think this last lady, Ms. Brown, somewhat alluded to it, I think the jurors performed a magnificent public service. I think jurors always do. And I think that there should be no implication that this hearing is in any way a reflection upon the conclusion that you reached. We who sit here did not hear the evidence. You heard the evidence. You came to your own independent conclusion. And I think your comment that there was a lot of pressure and probably still is a kind of a pressure in the community is very realistic as a fact of life.

I think there are those who might have come to different conclusions because they saw something happen on television—and I might be one of them. But the fact is you did what you were called upon to do as members of our society and community. You did it in the manner that you thought appropriate.

I think that jurors are always owed a debt of gratitude by those who have not served. This was a particularly difficult case. My guess is that it is particularly difficult for you at the moment because some of your neighbors may say, well, I know he was guilty; I saw what happened. I, for one, want you tc understand that in our conducting this hearing we are inquiring into the law. We are inquiring into whether or not there ought to be changes in the law. We are not in any way attempting to second-guess the jury. Nor do we in any manner feel that we want to reflect upon the determination that you made on an independent basis.

I thank you for your public service both as being jurors as well as helping this committee in its deliberations. I just want to say thanks from this one particular Senator.

Senator **Specter**. Senator Heflin?

Senator **Heflin**. If you do not mind, I may not follow exactly the suggested formula. Ms. Brown, what is your profession? What is your occupation?

Ms. **Brown**. I am a shop mechanic for Potomac Electric Power Co.

Senator **HEFLIN**. You are what?

Ms. **BROWN**. A shop mechanic.

Senator **HEFLIN**. Ms. Copelin, what is yours?

Ms. **COPELIN**. I am a food service worker for D.C. public schools.

Senator **HEFLIN**. It is my understanding that in the jury that there was a person who was a psychological social worker. Do you remember who that individual was or who he was? Is he here among us? Is the person among us today?

Ms. **COPELIN**. No.

Senator **HEFLIN**. Who was that person? What was the name? Do you remember?

Mr. **COFFEY**. Mary Ann Schwartz.

Senator **HEFLIN**. Did she play a very active role in your discussions in your jury room?

Mr. **COFFEY**. Yes, she did.

Senator **HEFLIN**. Was she well informed in the issues of mental health and terminology dealing with insanity?

Mr. **COFFEY**. Seems like she did.

Ms. **BROWN**. Could I have something to say on that?

Senator **HEFLIN**. Yes.

Ms. **BROWN**. I feel that Mary Ann Schwartz did not use her background on this trial, because she was just like the rest of us. She took in the evidence and the testimonies just like the rest of us. She did not use any terminology or anything when we talked this over. If they had not told us she was in this field, we would never have even known it.

Senator **HEFLIN**. As I understand it, there was another juror who was the secretary to a doctor. Was that right or do you know?

Ms. **BROWN**. Yes.

Ms. **COPELIN**. Yes.

Senator **HEFLIN**. Who was that?

Mr. **COFFEY**. Evelyn Washington.

Senator **HEFLIN**. Did she take a very active position in regard to the jury deliberations and determinations?

Mr. **COFFEY**. Yes.

Ms. **COPELIN**. Yes. Everyone was active. No one put their job skills or careers in there. Only what we worked was what we got out of the court and out of the facts.

Senator **HEFLIN**. What I basically understand what you and Ms. Brown are saying is that the background of these two jurors and their advocacy of whatever cause they took was not unduly influential in the decision of the other jurors?

Ms. **COPELIN**. No. It was not.

Senator **HEFLIN**. All right. Now, let me ask each of you this. If the President had been killed, would your verdict have been different?

Mr. **LASSITER**. My decision I don't think it would be any different, no.

Mr. **COFFEY**. I do not think so either.

Mr. **JOHNSON**. I thought the man was really insane. I do not think it would have been any different.

Ms. **COPELIN**. I, I couldn't come to any other answer because— wait a minute now. I was undecided in the beginning. But, if you had that thing worded differently, you had that blank a little different, I think that would help everything.

Senator HEFLIN. You are talking about the form.

Ms. COPELIN. Yes.

Senator HEFLIN. In other words, if you had had another alternative choice——

Ms. COPELIN. Correct.

Senator HEFLIN [continuing]. Then it could——

Ms. COPELIN. Yes. If I had had another choice, in fact if we all had had another choice, it would have been different now. It would not have been this way.

Everyone knew beyond a shadow of a doubt that he was guilty for what he did. But we had that mental problem to deal with. We just could not shut that out.

Senator HEFLIN. As we told you in the beginning, you do not have to answer any question——

Ms. COPELIN. True.

Senator HEFLIN [continuing]. And nobody is trying to influence you. I did ask the question—do you prefer not to answer the question—if the President had died as to whether or not your verdict would have been different?

Ms. COPELIN. It would have been the same, I guess. I guess it would have been the same.

Senator HEFLIN. Ms. Brown?

Ms. BROWN. Well, by me not following my mind or sticking by my guns, I guess it still would have been the same because I did not stick by it anyway.

Senator HEFLIN. All right, now let me ask you this. Do you think that a jury decision is the proper method of determining the guilt or the innocence of an accused where insanity is involved?

Ms. COPELIN. Yes, I do because, even though we had the doctors and the professors there, they did not prove anything either with all their knowledge and degrees. They did not prove anything. So, yes, I think the jury is qualified for that.

Senator HEFLIN. Do any of you have any differences on that? Do you think that the jury system is the system that ought to be followed in determination of whether a person is responsible for his criminal action where there is evidence of mental problems? Do you all agree with the jury system?

All right.

Now let me ask you this. In the charge that you were given, were you convinced that the man was insane and therefore was not responsible for his act? Or were you left in a state of confusion and you felt that there was insufficient proof for you to be convinced either one way or the other?

Mr. LASSITER. No. I couldn't say that I was convinced. I was going by based on the evidence, all the information that I read and saw, was the only thing that brought me to my conclusion, not any influence from anyone.

Mr. COFFEY. Same thing. Based on the evidence and facts I believe that he was out of control of his actions.

Mr. JOHNSON. Almost the same thing. I listened to the testimony that was said in the courtroom. And then we went with the evidence in the deliberations. So, my answer is basically the same.

Ms. COPELIN. I went with the evidence. We had evidence there enough and information enough for us to go the way we did.

Ms. BROWN. The evidence, to me, could have went either way because some evidence were—he had a mental disorder but, as the psychiatrists say, narcissistic, or whatever it is, where you seek glory, fame, want to be a spotlighter, and all this. He had this. And he was the type of guy that, uh, nobody knows John Hinckley, so they are going to know me now.

As far as the defense evidence, the defense, to me, pulled out what they wanted; the same, I guess, on both sides. They showed us evidence that you could say, well, yes, he is insane. But then there was evidence saying no, he is manipulating; he knows what he is doing. So, you had to weigh either way. I guess, you know, some of us just weighed more on the insanity.

Senator HEFLIN. Let me ask you two more questions. Did you feel that the defendant had better psychiatric witnesses than the prosecution? Was there a better quality that represented the defendant? Were you more impressed with their witnesses as opposed to the prosecution's witnesses?

Mr. COFFEY. From my understanding, the prosecution witnesses were top-of-the-line psychiatrists.

Senator HEFLIN. You did not really see a difference?

Mr. COFFEY. I really did not see a difference. Both of them pulled out the big ones.

Senator HEFLIN. Is that generally the feeling of all the rest of you?

Mr. LASSITER. Yes.

Ms. BROWN. I feel that the defense psychiatrists did not know their job. Hinckley really manipulated them and put them in a bad spot.

I feel that the prosecution psychiatrists did get to know Hinckley better. I feel that, if the prosecution had maybe brought forth a couple of more of their psychiatrists, it might have been—because there were testimonies where some psychiatrists said things but they were not there to really bring forth what they meant by what they say they asked other psychiatrists about it.

So, as far as defense psychiatrists, I do not see how anyone really could have went too much on their testimony except for some of the things Hinckley told them.

Senator HEFLIN. Let me ask you this last question. Ms. Copelin, you have already given us a suggestion.

How do you think the system can be changed in order that the end result would be better, assuming that it could be made better? Do you have any suggestions as to what you think ought to be changed about the issue of criminal responsibility and insanity?

Mr. LASSITER. Well, at the present, I do not know.

Mr. COFFEY. I think it should be changed in some way where the defendant gets mental help, gets help enough that where he is not harmful to himself and society, and then be punished for what he has done wrong.

Mr. JOHNSON. Well, I do not know how the system should be changed. But I do think it should be changed. And I think it should be changed in a way that a person cannot claim that he is insane if he is not.

Ms. **Copelin**. I would like to take up behind that. Even if they claim, if they are going to play the part, give them the punishment for playing it.

Ms. **Brown**. I feel that the defense should have to prove that the defendant is insane. It should not be put on the prosecution because it is hard to prove that a person is sane. So, I feel that the system needs to be changed because, as it was said, criminals are going to commit crimes. And that they figure that he got away, I'm going to get away. And it definitely needs to be changed.

Senator **Specter**. Senator Biden, who is the ranking member on the Judiciary Committee of the minority, has joined us, but has agreed to defer to Senator Zorinsky in timing, Senator Zorinsky having been with us since the start. Senator DeConcini is here also, and he will be given an opportunity to question in turn. We will turn now to Senator Zorinsky.

Senator **Zorinsky**. Thank you, Mr. Chairman.

I am probably one of the—probably the only member of the panel up here that has not a law degree. My background is a businessman. Therefore, I may not be as eloquent in my determination of legal jurisprudence. But I come from the area of the country that I could tell by the questions that were asked my offices after the verdict. Generally, the high percentage of questions that were being called in to my offices, my senatorial offices in Nebraska was the question what went wrong. Obviously, for that type of a question, that is a leading implication that many people figure they were unhappy with the verdict.

I compliment you people. I have never been a juror. I cannot conceive. I think it was Ms. Brown that indicated she could not even make a telephone call after 4½ days unsupervised from there. So, I can sympathize with the degree of isolation that certainly occurs in those instances. On behalf of the citizens, I would like to compliment you for your services rendered and for your being here today, hopefully, to add something to be able to better the system.

My concern is that in changing the system we not create more problems than we currently have. Was I correct in hearing, Ms. Copelin, a comment that you made previously that there was no doubt in your mind that Mr. Hinckley was guilty of the immediate action—I think those were your words——

Ms. **Copelin**. Yes.

Senator **Zorinsky** [continuing]. That took place, that he knew the President of the United States was present. He knew the purpose of having gone there with a weapon.

Ms. **Copelin**. He knew all of it.

Senator **Zorinsky**. He knew all of it?

Ms. **Copelin**. No doubt in my mind.

Senator **Zorinsky**. There is no doubt in your mind that he was cognizant of the direction of the firearm, which was an extension of his physical arm, was pointed in that direction and that his intent was to hurtle the projectile which leaves the gun which is a bullet into the body of that individual. And he knew who that individual was?

Ms. **Copelin**. To me, with all the evidence, definitely. There is no doubt.

Senator **Zorinsky**. Ms. Brown, was there any doubt in your mind as to his knowing who was present on the sidewalk there or walking to the car?

Ms. **Brown**. He knew because he stated why were the police across the street. He knew. He mentioned to the press at the press line: we were here first. He knew all this. You know, he knew it was raining, you know. So, he had to know. And he even stated the President waved at him. Now, he didn't know that was the President? I mean, like I say, there was evidence there that he knew what was going on, you know. He had a choice. He even said he had a choice: to stay there, to go do something to Jodie, or go do something else. But he made this choice on his own. And this is what he did.

Senator **Zorinsky**. Mr. Coffey, was your concept different from those expressed by the ladies?

Mr. **Coffey**. I think he knew, but he just could not—the mental illness, he just could not control himself.

Senator **Zorinsky**. You feel he knew the President was there and——

Mr. **Coffey**. But just could not control himself.

Senator **Zorinsky**. I see. At that moment it was an impulse——

Mr. **Coffey**. Right.

Senator **Zorinsky** [continuing]. That overrode his normal ability and judgment to know whether to shoot or not to shoot.

Mr. **Coffey**. Right. Just could not control himself.

Senator **Zorinsky**. Mr. Johnson?

Mr. **Johnson**. I would have to say I feel exactly about the same way. He knew. I think he knew.

Senator **Zorinsky**. He knew?

Mr. **Johnson**. Because I think a person could have a mental problem and knew certain things. I think he knew.

Senator **Zorinsky**. Mr. Lassiter, did you have any other opinion?

Mr. **Lassiter**. Like I said before, I think he knew but at the time he could not control what he was doing, is why he did it. He could not help himself. That is what I believe.

Senator **Zorinsky**. Thank you. Now, the psychiatrists that were brought in to testify, Mr. Lassiter, I would like to ask you first this. How did you feel when the psychiatrists came in to testify that they were advocates either for the defense or for the prosecution as opposed to the possibility of having been an objective set of psychiatrists that may have only just reported to the judge and the jury as to their observations as to Mr. Hinckley rather than being there as advocates of one side or another? Do you think there is any merit of an objective panel of psychiatrists coming into the courtroom and talking to the jury and the judge as to their observations rather than being—well, the word has been used—hired guns of the prosecution or the defense? In your mind, would it have more impact if they were as a panel relating neither to the defense or prosecution but being hired by the court to give their comments as to their observations of Mr. Hinckley's well-being?

Mr. **Lassiter**. Well, either way, I can't see where there would be any difference. Like I know that the defense had their psychiatrists; so did the prosecution. So, I know that both of them are going to try to influence us that they are right. So, I didn't pay it any mind. I just heard both sides and then took into my own consideration of what——

Senator **Zorinsky**. Would you have felt more comfortable if you did not have to continually use the screening process that they are saying that because they are hired by that side, and this one is saying that because he is hired by that side?

Mr. **Lassiter**. I do not think so. No.

Senator **Zorinsky**. Mr. Johnson, would you care to comment?

Mr. **Johnson**. I will say this. We listened to a lot of psychiatrists before the trial was over. We heard psychiatrists from both sides. They explained the terms to us in the courtroom what was more severe in others. So, it seemed to me that before the trial was over that some of the psychiatrists were understating it and some of them were overstating it.

Senator **Zorinsky**. Some of them were what?

Mr. **Johnson**. Some of them were understating his mental problem and some of them were overstating his mental problem. I think it should stay the same—that a psychiatrist panel would not be the right thing to do. I believe the defense and the prosecution should have the right to hire their own psychiatrist.

Senator **Zorinsky**. I see.

Mr. **Johnson**. The severe part of the problem.

Senator **Zorinsky**. Some psychiatrists, you felt, were understating the severity of the disorder?

Mr. **Johnson**. That is right.

Senator **Zorinsky**. How did you make the determination of their understatement?

Mr. **Johnson**. I made the determination by the first part of the testimony, some of the psychiatrists were explaining to us what was more severe than others.

Senator **Zorinsky**. I see.

Mr. **Johnson**. That is the way I determined what was more severe than others.

Senator **Zorinsky**. Mr. Coffey, would you care to comment on that?

Mr. **Coffey**. Can you put the question to me again?

Senator **Zorinsky**. Would you have felt more comfortable with a panel of psychiatrists that were just giving their observations rather than taking up sides of psychiatrists testifying for the defense and other psychiatrists for the prosecution?

Mr. **Coffey**. Well, that is the way I took it anyway. I did not really say, well, this is the prosecution psychiatrist and defendant. I just took it all as one.

Senator **Zorinsky**. Ms. Copelin, would you like to comment on that?

Ms. **Copelin**. I believe the way it is is all right as long as they bring out whatever points, as long as it is understood. In our case, all the terms and everything were defined to us before. So, when the first ones came in, it was always, you know, they would put their terms and they would break it down to layman's terms. They would call their terms and they would break it down. They would discuss and tell us about it. So, we knew what the different things were about when the others came with different statements, the others threw out their own thing.

Senator **Zorinsky**. Ms. Brown, were you offended in any way that here were hired psychiatrists on one side and on the other side debating the issue as opposed to an impartial panel that would just come in and report on their observations?

Ms. **Brown**. Well, a couple of the psychiatrists, they would start out, OK, you could kind of understand what they were saying. But then they would go into a long lecture or go into all these terms. It really got lost. I did. By the time they get through telling you what it is all about, you have forgotten what the question was.

We had a few that really were more pinned up on themselves and you forget the question. So, it was kind of hard.

Some of them would break it down and stay down, you know. They would not go off into these long journeys or something you don't even understand.

Senator **Zorinsky**. Ms. Brown, let me pursue that further. Do you feel that it would be simpler for you as a juror to make a decision if the burden was on the defense to prove insanity rather than the prosecution to prove sanity?

Ms. **Brown**. Yes, I think it would. The prosecution psychiatrists and people that worked on it, they really went all out. They really went. They interviewed a lot of the witnesses. They brought in good witnesses, people who saw him that day who could really relate.

The defense psychiatrists, they mainly were relating to his past years. None of them really related to what happened then or how he was. They did not tell us what they observed when they were talking to him as much as trying to find out what his letters were and what he did when he was in elementary and all this. We were mainly dealing with what he did March the 30th—how he felt March the 30th.

And none of them proved anything to me about that.

Senator **Zorinsky**. Thank you. Ms. Copelin, would you comment? Do you feel it would be better for a jury to evaluate these types of verdicts if the burden of proof was put on the defense to prove the insanity? As you know, in this particular case, the prosecution was trying to prove sanity and, obviously, were not successful. Do you think it would be simpler to concentrate on the defense being able to prove the insanity of the individual?

Ms. **Copelin**. Yes. The defense should have some problem in trying to, you know, really get to it. If your man is sick, prove to me he is sick. And then let me deal with it.

Senator **Zorinsky**. Do any of you gentlemen differ with that?

Mr. **Johnson**. Well, I would just like to say this. I think it is harder for the prosecutor to prove that he was insane than it was for the defense.

Senator **Zorinsky**. You concur——

Senator **Specter**. I think we are going to have to move along now.

Senator **Zorinsky**. Thank you very much.

Senator **Specter**. We have been trying to hold the questioning time to about 10 minutes for each Senator. If I may, before proceeding to Senator Biden and Senator DeConcini, I would just say that in the opening portion we had discussed the issue of sensitivity of questioning jurors generally. We said that they were free not to answer any question and did not have to answer any questions they were uncomfortable with. We appreciated their coming because Congress has never acted on the issue of insanity, and we are trying to deal with the questions.

The first round had been on the definition of insanity, starting off with the charge which Judge Parker gave and examining some other standards. My thought was, although obviously every Senator is free to pursue it any way he chooses, to then take up in the second round the burden of proof and in the third round the scope of the psychiatric evidence. Those lines are dotted lines, obviously, and have been crossed. But I just wanted to give you the framework that we started with.

Senator BIDEN. Thank you, Mr. Chairman. I have a fairly lengthy opening statement that I will not read but ask that it be included in the record at this point as if read.

Senator SPECTER. Without objection, it shall be placed into the record.

[The prepared statement of Senator Biden, with attachments, follows:]

PREPARED STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

LAST MONTH A BIPARTISAN GROUP OF MY COLLEAGUES AND I INTRODUCED THE VIOLENT CRIME AND DRUG ENFORCEMENT IMPROVEMENT ACT OF 1982. THE BIPARTISAN CRIME PACKAGE S. 2572 PROPOSES SIGNIFICANT IMPROVEMENTS IN THE CRIMINAL JUSTICE SYSTEM, PARTICULARLY IN THE AREA OF NARCOTICS RELATED VIOLENT CRIME AND ORGANIZED CRIME.

TITLE VII OF THE BILL SPECIFICALLY ADDRESSES THE INSANITY DEFENSE. IT STATES: "IT IS A DEFENSE TO A PROSECUTION UNDER ANY FEDERAL STATUTE THAT THE DEFENDANT, AS A RESULT OF MENTAL DISEASE OR DEFECT, LACKED THE STATE OF MIND REQUIRED AS AN ELEMENT OF THE OFFENSE CHARGED. MENTAL DISEASE OR DEFECT DOES NOT OTHERWISE CONSTITUTE A DEFENSE."

THE INSANITY DEFENSE IS SUCCESSFULLY INVOKED IN ONLY ABOUT 100 CASES EACH YEAR IN FEDERAL, STATE NAD LOCAL TRIAL COURTS AND RARELY IN THE KINDS OF CRIMES THAT ARE THE PRIMARY FOCUS OF THE BIPARTISAN CRIME PACKAGE -- ROBBERIES, MUGGINGS AND BURGLARIES OR ORGANIZED CRIME OFFENSES. HOWEVER, THE SUCCESSFUL INVOCATION OF THE OFFENSE HAS ACHIEVED SUCH NOTORIETY - AS IN THE HINCKLEY CASE - THAT IT DESERVED OUR IMMEDIATE ATTENTION.

THE INSANITY DEFENSE PROVISION CONTAINED IN S. 2572 IS THE PRODUCT OF OVER A DECADE OF STUDY OF EXPERIENCE WITH THE DEFENSE, ESPECIALLY HERE IN THE DISTRICT OF COLUMBIA. THOSE OF US WHO SUPPORT THE LANGUAGE CONTAINED IN SECTION 701 OF THE BILL HAVE COME TO THE SAME CONCLUSION AS A RECENT PIECE IN THE "OUTLOOK" SECTION OF THE WASHINGTON POST BY A CLINICAL PROFESSOR OF PSYCHIATRY AT COLUMBIA MEDICAL SCHOOL -- THAT THE INSANITY DEFENSE HAS "GONE BONKERS". OR AS A FORMER PRESIDENT OF AMERICAN PSYCHIATRIC ASSOCIATION HAS POINTED OUT TRIALS INVOLVING THE INSANITY DEFENSE HAVE MADE PSYCHIATRIC EXPERT WITNESSES SEEM LIKE "CLOWNS PERFORMING IN A THREE-RING CIRCUS"

THE INSANITY DEFENSE HAS UNDERGONE OVER A CENTURY OF EVOLUTION SINCE THE HOUSE OF LORDS HANDED DOWN THE FAMOUS RULE IN M'NAGHTEN'S CASE IN 1843. THE BASIC "RIGHT-WRONG" RULE IN THAT CASE CAN BE SUMMARIZED AS FOLLOWS:

> ". . . AT THE TIME OF THE COMMITTING OF THE ACT, THE PARTY ACCUSED WAS LABOURING UNDER SUCH A DEFECT OF REASON,

> FROM DISEASE OF THE MIND, AS NOT TO KNOW THE NATURE AND QUALITY OF THE ACT HE WAS DOING; OR, IF HE DID KNOW IT, THAT HE DID NOT KNOW HE WAS DOING WHAT WAS WRONG."

THE M'NAUGHTEN RULE WAS GRADUALLY ERODED IN THE FEDERAL SYSTEM, ESPECIALLY IN THE DISTRICT OF COLUMBIA CIRCUIT AND IN SEVERAL STATE JURISDICTIONS. THE BASIC THESIS OF THE ATTACK IS THAT THE RULE DID NOT TAKE INTO ACCOUNT THE ADVANCES OF FREUDIAN PSYCHIATRY AND IN 1954 THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HANDED DOWN THE LANDMARK DECISION IN THE CASE OF DURHAM V. UNITED STATES. IN THE DURHAM CASE THE FOCUS BEGAN TO SHIFT TOWARD THE CAUSE OF THE DEFENDANT'S ACT OR IN ESSENCE "WHETHER IT WAS THE PRODUCT OF MENTAL DISEASE OF DEFECT". FOR ALMOST 20 YEARS HERE IN WASHINGTON, AND IN OTHER JURISDICTIONS THAT HAD ADOPTED THE RULE, COURTS ENGAGED IN A VERY COMPLEX AND FRUSTRATING EFFORT TO SIFT THROUGH CONTRARY TESTIMONY BY PSYCHIATRIC EXPERT WITNESSES TO UNDERSTAND THE MEDICAL EXPLANATIONS OF WHY THE DEFENDANT COMMITTED THE CRIMINAL ACT.

IT BECAME OBVIOUS THAT THE DURHAM APPROACH WOULD NOT WORK, AS ONE EXPERT POINTS OUT, BECAUSE:

> ". . . PSYCHIATRY AND THE LAW STAND IN ESSENTIAL CONTRADICTION AND OPPOSITION. THE LEGAL VIEW OF OF BEHAVIOR IS IN ESSENCE MORALISTIC; AN ACTION IS APPROVED OR DISAPPROVED, RIGHT OR WRONG, ACCEPTABLE OR UNACCEPTABLE. A PERSON IS GUILTY OR INNOCENT AS MORE OR LESS CLEARLY DEFINED IN ADVANCE BY LAW. BUT PSYCHIATRY IS A BRAND OF MEDICINE, AND IN MEDICINE NOTHING IS WRONG, ONLY SICK. A MAN CAN BE NO MORE GUILTY OF CRIME THAN HE IS GUILTY OF AN ABSCESS."

IN A SENSE JUDGES, LAWYERS AND PSYCHIATRIC EXPERT WITNESSES HAVE BEEN TALKING PAST EACH OTHER.

IN 1972, THE DURHAM RULE WAS NARROWED IN THE CASE OF UNITED STATES V. BRAWNER. THE FOCUS NOW is UPON WHETHER THE DEFENDANT SUFFERED FROM AN IRRESISTABLE IMPULSE. IN OTHER WORDS, THE DEFENSE LIES IF AT THE TIME OF THAT CONDUCT THE DEFENDANT LACKED THE MENTAL CAPACITY EITHER 1) TO RECOGNIZE THAT WHAT HE WAS DOING WAS WRONG, OR 2) TO CONTROL HIS CONDUCT.

EVEN THOUGH THIS SEEMED TO NARROW THE SELF-DEFEATING SEARCH FOR THE SOURCE

OF THE DEFENDANT'S ACTION IN THE DURHAM RULE, IT STILL PERMITS THE "CIRCUS" THAT THE FORMER PRESIDENT OF THE AMERICAN PSYCHIATRIC ASSOCIATION COMPLAINED ABOUT.

AS A RESULT OF DISSATISFACTION WITH THESE FORMULATIONS OF THE RULE, A NEW CONSENSUS HAS BEGUN TO EMERGE. THAT CONSENSUS, THOUGH BY NO MEANS INVOLVING A MAJORITY OF EXPERTS,INVOLVES A SURPRISING CROSS SECTION OF IDEOLOGICAL VIEWS. THE SO-CALLED MENS REA DEFENSE INCLUDED IN THE BIPARTISAN CRIME PACKAGE FOCUSES ON WHETHER THE DEFENDANT HAD THE MENTAL CAPACITY TO HAVE THE STATE OF MIND -- INTENT, KNOWLEDGE, OR RECKLESSNESS -- REQUIRED BY THE CRIMINAL STATUTE IN QUESTION. SO NO LONGER WOULD THE COURT BE CONCERNED WITH WHETHER THE DEFENDANT COULD TELL RIGHT FROM WRONG OR CONTROL HIS BEHAVIOR BUT RATHER WITH WHETHER THE DEFENDANT UNDERSTOOD THAT IN AN ATTEMPT TO "SLIT SOMEONE'S THROAT" HE INTENDED TO ENGAGE IN THAT ACT RATHER THAN SLICING ORANGES.

THIS PROPOSAL WAS MODELED AFTER AN APPROACH THAT HAS BEEN USED WITH CONSIDERABLE SUCCESS IN SWEDEN. IT WAS FIRST PROPOSED AS A PART OF THE FEDERAL CRIMINAL RECODIFICATION IN THE EARLY 1970'S. IT ENJOYED THE SUPPORT OF THE NEW YORK CITY BAR ASSOCIATION, AS WELL AS COMMITTEES OF THE NEW YORK COUNTY, NEW YORK STATE AND AMERICAN BAR ASSOCIATION. IT ALSO HAD THE SUPPORT OF A NUMBER OF DISTINGUISHED LAW PROFESSORS IN THE AREA OF CRIMINAL LAW, PROFESSOR JOSEPH GOLDSTEIN AT YALE AND NORVAL MORRIS AT THE UNIVERSITY OF CHICAGO AND DR. KARL MENNINGER, ONE OF THE NATION'S MOST DISTINGUISHED EXPERTS IN THE FIELD OF PSYCHIATRY.

I ASK UNANIMOUS CONSENT THAT AN EXCERPT FROM AN EARLIER SENATE JUDICIARY COMMITTEE REPORT EXPLAINING THE RATIONALE OF THE SO-CALLED MENS REA DEFENSE BE INSERTED AT THIS POINT IN THE CONGRESSIONAL RECORD ALONG WITH TWO ARTICLES THAT APPEARED OVER THE WEEKEND BY DISTINGUISHED PSYCHIATRISTS CRITICISING THE CURRENT RULES ON THE INSANITY DEFENSE.

CRIMINAL CODE REFORM ACT OF 1981
REPORT No. 97-307

The Mens Rea Test

One suggested formulation of an insanity test would provide a defense if the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect would not otherwise constitute a defense."[47] This concentrates attention on the defendant's mental condition insofar as it relates to determining whether the offender acted with the mental states necessary to commit the offense charged.[48] Thus the focus of initial inquiry in criminal trials would be on such questions as "Did the defendant intend to hijack an aircraft?" in a case of air piracy, rather than "Could he have conformed his conduct to the requirements of law?" The Model Penal Code commentary illustrates the proper subject of an insanity defense by posing the example of a madman who believes that he is squeezing lemons when he is actually choking his wife. Under the *mens rea* test he would not be guilty of murder, not because he fell

---

[45] Model Penal Code, §4.01, Comments p. 160 (Tent. Draft No. 4, 1955).

[46] See Diamond, *From M'Naghten, to Currens, and Beyond*, 50 Cal. L. Rev. 189 (1962).

[47] Such language was contained in S. 1400 and S. 1 of the 94th Congress and was approved by the New York City Bar Association's Special Committee, Hearings, pp. 3490-3491. In the present 97th Congress, Senator Hatch has introduced two bills, S. 818 and S. 1558, which propose this same formulation.

[48] While the provisions are treated in depth in that part of the report dealing with subchapter B of chapter 36, it is worth mentioning here that one who intends to rely upon a defense of insanity must give notice of the defense under Rule 12.2 of the Federal Rules of Criminal Procedure. Cf. *Williams v. Florida*, 399 U.S. 78 (1970). The provisions of section 3612 allow for comprehensive psychiatric examinations and a special verdict of not guilty by reason of insanity.

within a special defense, but because he lacked the state of mind required by the offense, that is, he did not knowingly cause the death of another person.

The critical issue is seen as one of disposition. Assuming a finding of an intent to hijack the aircraft and of the requisite conduct, the question at the time of sentencing would be whether, in light of all the circumstances, the defendant should be committed to prison, to a mental hospital, or to some other program.

Apart from its bearing on the defendant's commission of an element of the offense, his mental state or condition at the time of the offense would not provide an excuse for his conduct.

Advocates of a *mens rea* test recognize that certain persons who may be found not guilty by reason of insanity under traditional insanity tests,[49] but who have in fact committed a criminal offense as a result of mental disease or defect, may objectively be found to have committed the offense—and thus to be "guilty"—under this standard.[50] The undesirability of labeling such persons as "guilty" of a crime—given the term's collateral moral connotations—should be weighed against two factors. First, the test would put and end to the abuses which have arisen under the older, more confusing insanity standards and which have in the past allowed those actually guilty of crimes to go free, e.g., those who "cannot" control their behavior because they do not choose to make the effort to do so. Second, though such persons may be technically guilty of an offense under the new standards, the stigma attached to a determination of criminality will be materially mitigated at the sentencing stage by publicly adjudging them to be deserving of proper medical care rather than deserving of a punitive sentence of imprisonment. The nature of the disposition provided by the sentence will constitute society's recognition of the defendant's lack of moral culpability for his offense.

The *mens rea* test is quite simple. In fact this simplicity, when compared to existing law, is one of its major virtues. However, as the hearings before this Committee reveal, the proposal has been the subject of a significant amount of controversy. Support for the *means reá* test is based on three factors: fair treatment for the offender; protection of society; and the proper administration of criminal justice.

Fair treatment for the offender: Dealing with the mentally ill offender, and the history of the insanity defense illustrates, has proven to be a difficult matter. The person has committed the conduct forbidden by law. He has offended social norms and may well doe so again. Yet, there is a natural reluctance to punish an abnormal person for failure to conduct himself in normal fashion.

---

[49] The number of persons raising the defense in a given year has been estimated at less than 1% of serious felons with less than 100 persons successfully raising the defense. The Federal portion would be considerably less. See Hearings, p. 7023 (testimony of Seymour Pollack, M.D., President, American Academy of Psychiatry and the Law). Another expert has stated that the defense is successful in only 2% of the cases. See Hearings, p. 7007 (testimony of Stanley Portnow, M.D., Chairman, Committee on Psychiatry and the Law, American Psychiatric Association).

[50] While the categories of such individuals cannot be completely ascertained in advance of a body of decisions under the standard proposed here, for general purposes it can be stated that those who would not be exculpated under this kind of formulation, but who probably would be judged not guilty by reason of insanity under traditional tests, include a person who asserts that he cannot control his behavior, e.g., he is driven by an overpowering urge to steal, and a person who operates under a delusion that what he does is not morally wrong, e.g., he is told by a voice to kill in order to rid the world of an "evil" person

On the other hand if the traditional criteria for confinement are considered, then the mentally ill offender is particularly in need of confinement. He is in need of treatment and rehabilitation. Society may well be protected by his incapacitation. His confinement may provide as much deterrent effect as the confinenment of any other offender. Only retribution seems to be an inappropriate basis for his confinenment since his moral fault may in some cases be considered to be non-existent or at least less than that of the "normal" offender.

If focus is placed on conviction rather than disposition the question becomes even more difficult, for under traditional analysis only the "blameworthy" should be branded as criminals. The question then reduces itself to the inquiry as to when is a mentally ill offender blameworthy. This approach answers that question by stating that all offenders are blameworthy to the extent that they may be found guilty of committing an offense when their mental state as to the proscribed conduct and the circumstances surrounding that conduct is that state required by the offense. In that sense, i.e., with regard to the state of mind of the defendant, the mentally ill offender is treated fairly for he is treated the same as all other offenders.[51]

It has been persuasively argued that the mentally ill offender possibly may presently be treated better than some who also have a colorable claim to lack of blameworthiness. Professor Norval Morris has stated the case as follows:[52]

> It too often is overlooked that one group's exculpation from criminal responsibility confirms the inculpation of other groups. Why not permit the defense of dwelling in a Negro ghetto? Such a defense would not be morally indefensible. Adverse social and subcultural background is statistically more criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice which a nondeterministic criminal law (all present criminal law systems) attributes to accused persons. True, a defense of social adversity would politically be intolerable; but that does not vitiate the analogy for my purposes. You argue that insantiy destroys, undermines, diminishes man's capacity to reject what is wrong and to adhere to what is right. So does the ghetto—more so. But surely, you reply, I would not have us punish the sick. Indeed I would, if you insist on punishing the grossly deprived. To the extent that criminal sanctions serve punitive purposes, I fail to see the difference between these two defenses. To

---

[51] The present insanity defense also tends, more than would the formulation under discussion, in a practical sense to discriminate against the poor defendant. Insanity is frequently and probably properly called a "rich man's defense," for the wealthy can sift the pool of potential expert witnesses for those who will produce favorable testimony in a convincing manner. Poor men, on the other hand, have typically had to rely on public mental hospital experts, or those selected by the court whose reports commonly have been made available to the prosecution as well as the defense. Signs of change are detectable, see 18 U.S.C. 3006A(e), authorizing payment of expert witnesses selected privately by an indigent defendant, but they do not appear to be likely to result in total equality of advantage in litigation of insanity issues.

[52] Morris, *Psychiatry and the Dangerous Criminal*, 41 S. Cal. L. Rev. 514, 520 (1968).

> the extent that they serve rehabilitative, treatment, and curative purposes I fail to see the need for the difference.

The question arises whether it is still not unfair to impose the stigma of criminality on those few who would be exculpated under some current tests but not under the restricted view and whether they ought to be afforded medical rather than penal treatment.

As to the first of these, it is argued that it is altogether uncertain that the criminal label stigmatizes more than does the label of criminal insanity.[53]

As to the question of treatment or disposition, the same latitude in meeting the needs of the defendant should be available in the sentencing process as in a mental commitment procedure.

Indeed, as to therapeutic treatment, it has been suggested that it is more desirable to treat mentally ill offenders as responsible for their actions than it would be to excuse their conduct entirely.[54]

Protection of society: To the extent that the *mens rea* test holds forth greater promise of rehabilitative treatment, it affords greater protection for society in general. To the extent that the proposal requires a direct relationship of the defendant's overall mental state to his criminal culpability it removes nebulous and extraneous issues from the determination of guilt. To the extent that it precludes spurious and fabricated claims it makes justice more swift but no less just.

While the actual effects would only be determined by implementation, it is reasonable to believe that a *mens rea* test would do much to achieve the objectives stated above and that the achievement of those objectives would do much to protect the public interest.

Administration of criminal justice: The various insanity defenses currently in use impeded the administration of justice in two significant ways. First, they focus upon terms which are hopelessly vague to the courts, the lawyer, the psychiatrist, and the layman. Second, they allocate psychiatric resources in a manner that is largely inappropriate and frequently unseemly.

The following dialogue between Dr. Karl Menninger and a trial judge is illustrative of the first point:[55]

> JUDGE. Well, what about the question of whether or not this man is responsible under the law. He committed a crime; that we know. But there is still the question of his intentions and his capacity for knowing right from wrong, his capacity to refrain from the wrong if he knows what wrong is. If he is not responsible, then technically he is not guilty.
>
> ANSWER [Dr. Karl Menninger]. Your Honor, responsible is another one of these functionally undefined words.

---

[53] See generally Farina et al. *Mental Illness and the Impact of Believing Others Know About It.* 71 J. Abn. Psych., Feb. 1971. pp. 1-6; Farina, Holland, and Ring. *The Role of Stigma and Set in Interpersonal Interaction*, 71 J. Abn. Psych., Dec 1966 pp 421 428; Enis *Civil Liberties and Mental Illness*, 7 Crim. L. Bull. 101 (1971); Grazia. Report on Pretrial Diversion of Accused Offenders to Community Health Treatment Programs (Georgetown U. School of Medicine, 1972).

[54] Working Papers, p. 251.

[55] Menninger. *The Crime of Punishment*, pp. 136-137 (1968)

> Judge. But your colleagues have often testified in this court that in their opinion a certain prisoner *was* or *was not* responsible.
>
> Answer. Yes, your Honor, because the word *responsible* is in every day use. But this use is different from the legal use, as you well know, and that fact is not always clear to your witnesses.
>
> * * * * *
>
> What you want to know, I suppose, is whether this man is capable of living with the rest of us and refraining from his propensity to injure us. You want to know whether he is dangerous, whether he can be treated and cured—whether we must arrange to detain him in protective custody indefinitely.
>
> Judge. Exactly. This is indeed what the court would like to know. But it seems we do not know how to communicate with one another, and our laws do not permit us to ask you. How, I beg of you, may I obtain direct, nonevasive answers to precisely these questions?
>
> Answer. Your Honor, by asking for them. As you say yourself, you are not permitted by precedent and custom to do so.

Chief Judge Bazelon, a prolific writer on the subject of the insanity defense, has himself cast doubt as to its utility simply because of the difficulty in stating the terms in a comprehensible manner.[56]

While the *mens rea* test, dependent as it is on the use of the phrase "mental disease or defect," may be said to suffer from some of the same vagueness problems it should be noted that the reduction in availability of the defense reduces the harm and impact of the necessary vagueness. Moreover, juries have traditionally dealt with the existence or non-existence of *mens rea* and this formulation, unlike the traditional insanity defense, poses no additional burdens on them.

The misallocation of psychiatric and psychological resources is an additional consideration favoring a *mens rea* approach. The question has three aspects; first, the shortage of psychiatric resources; second, the unseemly battle of the experts; and third, the desirability of using such personnel functionally, by explicitly directing their attention to the crucial questions whether defendants should be institutionalized and, if so, to what sort of facility.

As to the first, it is of some interest that in response to a survey conducted some years ago by the Committee staff, some 62% of the Departments of Mental Health in the several States favored either total abolition of an insanity defense or abolition of a separate insanity defense.[57] Many of the responses favoring some form of abolition emphasized the burden that the defense creates on their departments and the time it takes away from the therapy.[58]

---

[56] *Washington* v. *United States*, 390 F.2d 444, 457 n.33 (D.C. Cir. 1967). See also the English case of *Regina* v. *Byrne*, [1960] 2 Q.B. 396, 404: "In a case where the abnormality of mind is one which affects the accused's self-control the step between 'he did not resist his impulse' and 'he could not resist his impulse' is, as the evidence in this case shows, one which is incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses."

[57] Hearings, pp. 6381-6409.

Not only do the present defenses place a burden on resources, they also misuse them, for as one psychiatrist wrote to the Committee: "I have felt for a long time that psychiatry does not belong in the adversary proceeding. There is nothing in the training of a psychiatrist which prepares him for this type of business. I think his primary training has to do with the diagnosis and treatment of mentally and emotionally sick people."[59] Moreover, it can hardly be said to be therapeutically valuable to have a patient view psychiatrists as advocates for or against the patient.

Several other persons who have appeared before or corresponded with the Committee have expressed a distaste for the "battle of the experts."[60] They concluded that it can be of little good to the general view of the psychiatric profession and the criminal justice system to require psychiatrists to testify against each other in an advocate form on matters on which many of them argue they have no expertise.[61]

Continuation of an insanity defense based on amorphous concepts of blameworthiness may ultimately be detrimental to the administration. of the criminal justice system and is a waste of judicial and psychiatric resources.[62]

The ultimate question, posed by one expert in the field, is "why an insanity defense?"[63] Exceptions to criminal liability should be based on sound policy grounds, for such special and unequal treatment should not be lightly permitted. A focus on the culpability of the defendant as defined by the state of mind elements is one answer to the question posed. The Committee has found widespread support for the *mens rea* test since its initial proposal by the National Commission's consultant on the subject, its recommendation by a substantial minority of the members of the National Commission, and its adoption in S. 1400 of the 93d Congress.

The Committee on Federal Legislation of the New York County Lawyers Association, in its report on its proposed new Federal Criminal Code, noted the difficulties with the various current formulations of the insanity defense and urged that condiseration be given to abolishing the separate insanity defense.[64] Subsequently, in testifying on behalf of the Association, Mr. Vincent L. Broderick noted that:[65]

---

[58] The terminology "abolition of the insanity defense" is commonly used by writers in the field as a shorthand reference designed to include the modified form of an insanity defense. A more accurate reference would be "abolition of the *separate* insanity defense" or "abolition of the *traditional* insanity defense." Most of the writers utilizing such terminology have in mind a formulation under which psychiatric testimony could be introduced with regard to the defendant's possession of the mental state required as an element of the offense charged—a possibility which is not generally available under the approach of current law.

[59] Hearings, p. 6391 (letter of Zigmond M. Lebensohn, M.D.).

[60] E.g. letter of Dr. Ethel Bonn, *id.* at 6388; letter of Dr. Reginald White, *id.* at 6396.

[61] *Id.* at 6385.

[62] A fairly extreme example is *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957), in which eleven psychiatrists examined the defendant and testified before the jury. In the District of Columbia a committee of the Judicial Conference reported that some psychiatrists were avoiding hospital staff conferences evaluating persons facing criminal charges to avoid being subpoenaed. Judicial Conference of the District of Columbia Circuit, *Report of the Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases Before Trial*, p. 32 (1966).

[63] Goldstein, *The Brawner Rule—Why? Or No More Nonsense on Non Sense in the Criminal Law, Please!*, 1973 Wash. U.L.Q. 12.

[64] Hearings, p. 1402.

[65] *Id.* at 5929, 5933-5934.

> In the area of insanity as a defense the approach taken by S. 1400 is more consistent with the prior reports of this Committee and other Bar groups.
>
> S. 1400 had adopted our recommendation and that of the other Bar groups by providing that insanity is a defense only insofar as it negatives the intent required for commission of the offense (section 502). For the reason stated in the prior reports of our Committee and the other Bar groups, we deem S. 1400 to be preferable to S. 1 in this area.

Mr. Broderick emphasized that the Association's Committee or Federal Legislation felt "quite strongly" that the separate insanit defense should be abolished.[66]

Similar support has been expressed by the Committee on Federa Legislation of the New York State Bar Association. Mr. Anthony P Marshall, testifying as Chairman of that Committee, observed:[67]

> Our report ("The Dilema of Mental Issues in Criminal Trials—Report of the Committee on Federal Legislation," 41 N.Y. State B.J. 394) in 1969 suggested that . . . the insanity defense should be abolished, and questions of mental competency should only be considered in regard to whether the defendant had the requisite criminal intent to commit the offense with which he was charged.
>
> S. 1400 essentially adopts that view. . . .
>
> (W)e favor the treatment in S. 1400. . . .

The Association of the Bar of the City of New York expressed similar view:[68]

> We also endorse the views expressed in the Consultant's Report on Criminal Responsibility—Mental Illness: Section 503 (Working Papers, pp. 228 et seq.), particularly the summary of considerations set out at pages 248-254. We believe that the elimination of the insanity defense should be accompanied by more careful and sophisticated attention to the mental condition of the accused in connection with sentencing and the channeling of the accused to appropriate correctional or treatment facilities.

A special committee formed by the American Bar Association t review the National Commission's Code stated in its report:[69]

> A majority of the Committee present voted that § 503 should be approved as drafted. It should be noted, howev-

---

[66] *Id.* at 5947.

[67] *Id.* at 3490-3491.

[68] *Id.* at 6363, 6364-6365.

[69] *Id.* at 5406. See generally Working Papers, pp. 229-259. Further support may be found the following sources: Kosta, *A Comparable Study of Criminal Insanity: A Plea for the Abolit. of the Insanity Defense*, Hearings, pp. 2154 *et seq.*; Committee on Federal Legislation, New Y State Bar Association, *The Dilemma of Mental Issues in Criminal Trials*, 41 N.Y. State B.J. . (1969); Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 Yale L.J. 853 (1963); Do lns, *Should There Be An Insanity Defense?*, Corrective Psych. & J. Soc. Therapy, Fall 1968, 129; Menninger, *The Crime of Punishment* (1968); Friedman, *No Psychiatry in Criminal Co* 56 A.B.A.J. 242 (1970). See also Bennett & Matthews, *The Dilemma of Mental Disability and Criminal Law*, 54 A.B.A.J. 467 (1968); Schwartz, *Psychiatry and Criminal Law*, N.Y.L.J., July 1968, p. 54, col. 7; Arafat & McCaherty, *The Insanity Defense and the Juror*, 22 Drake L. R 538 (1973); Goldstein, *supra* note 63.

> er, that a substantial minority of the Committee felt that section 503 should be amended to provide that a mental disease or defect provides no defense unless it negatives an element of the offense. The formulation would eliminate "insanity as a separate defense, according it only evidentiary significance." 1 Working Papers 247. The problems of formulating an intelligible or workable insanity defense need no documentation. No one has been satisfied with the attempts made to date, least of all the psychiatrists, and other professionals called upon as expert witnesses to make or break the defense. The minority believed that it would be preferable to direct attention to the more pressing issues concerning (1) civil commitment of the mentally ill acquitted by virtue of their lack of culpability; (2) competency to stand trial; (3) treatment of the mentally ill convicted of a crime; and (4) the corresponding procedural questions that must be answered.

A study in comparative law of the Swedish experience under laws similar to a *mens rea* test illustrates that the approach is not only workable but effective.[70] The reported bill, by deleting any reference to the issue, will leave the further development of the appropriate approach to this problem to the courts in the light of experience and the accumulating insights of the varied disciplines involved.

4. *Intoxication*

Under present Federal law, no special legal doctine is applied to the vast majority of criminal cases where intoxication is associated with the commission of a criminal act. Intoxicated persons ordinarily intend their conduct in a way similar to those who are sober. As a result, intoxication is quite uniformly held not to be exculpatory or to afford a defense in itself.[71] This principle prevails even if the defendant's intoxication was a manifestation of a disease (e.g., chronic alcoholism) and thus in some sense not wholly voluntary, since the commission of offenses forms no "characteristic and involuntary, since the commission of offenses forms no "characteristic and involuntary pattern of the disease."[72] Indeed in *Powell* v. *Texas*, the Supreme Court rejected a claim that chronic alcoholism was a constitutionally required defense even to a charge of public drunkenness, on the ground that, while the chronic alcoholic may have no control over his drinking, it is no necessary part of his disease that he be drunk in public.[73]

Although voluntary intoxication is not recognized as a defense *per se*, the Federal courts—like those in virtually every State[74]—hold that such intoxication may be considered in determining whether the defendant possess the "specific intent" required for the commission of certain crimes; on the other hand, where the crime is said to involve only a "general intent," proof of intoxication is held irrelevant to guilt. Examples of crimes falling in the latter category are felony murder,[75] second degree murder and manslaughter,[76] rape,[77] bank robbery,[78] and assault with a dangerous weapon.[79] Examples of offenses to which proof of intoxication is deemed relevant are first degree (non-felony) murder, kidnapping, burglary, and theft.[80]

---

[70] See Moyer, *The Mentally Abnormal Offender in Sweden: An Overview and Comparisons With American Law*, 22 Am. J. Comp. L. 71 (1974).

[71] E.g., *United States ex rel. Rucker v. Myers*, 311 F.2d 311 (3d Cir. 1962), cert. denied, 374 U.S. 844 (1963).

[72] See *Powell v. Texas*, *supra* note 43 at 559 n.2 (Fortas, J., dissenting); *Driver v. Hinnant*, 356 F.2d 761, 764 (D.C. Cir. 1966); see also Working papers. p. 225.

[73] See also *United States v. Moore*, 486 F.2d 1139 (D.C. Cir.) (*en banc*), cert. denied 414 U.S. 980 (1973) (drug addiction not a defense to possession of drugs for personal use).

[74] E.g., *Kane v. United States*, 399 F.2d 730, 736 n. 11 (9th Cir. 1968), cert. denied, 393 U.S. 10[illegible] (1969).

It is evident that the terms "specific intent" and "general intent" in this context mask a good deal of conceptual ambiguity, since in certain crimes, such as rape, where the defense of intoxication has not been allowed, it is clear that the "intent required is more than that of merely committing the act."[81] The notion that intoxication will not establish a defense to some charges is, therefore, in effect a "special doctrine of liability."[82]

An analysis of the cases applying the "specific intent" versus "general intent" doctrine tends to support the conclusion that, where an element of an offense requires actual knowledge or intent, intoxication evidence has been deemed pertinent to show the defendant's lack of such mental state. Where, however, the mental element of an offense is satisfied by proof of reckelssness or negligence, the courts have not been disposed to consider intoxication as a defense. For instance, recklessness as to ownership of property is thought insufficient for larceny, and intoxication may negative the purpose or knowledge required. On the other hand, recklessness is sufficient for mansluaghter, and intoxication is not allowed to disprove it.[83]

---

[75] *United States ex rel. Rucker v. Myers*, *supra* note 71.

[76] E.g., *United States v. Jewett*, 438 F.2d 495, 498–500 (8th Cir.), cert. denied, 402 U.S. 947 (1971); *Kane v. United States*, *supra* note 71 at 736.

[77] E.g., *Henry v. United States*, 432 F.2d 114, 119 (9th Cir. 1970), cert. denied, 400 U.S. 1011 (1971).

[78] E.g., *United States v. Porter*, 431 F.2d 7, 9–10 (9th Cir. 1970), cert. denied, 400 U.S. [illegible] (1971); *United States v. De Leo*, 422 F.2d 487, 490–491 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).

[79] *Parker v. United States* 359 F.2d 1009 (D.C. Cir. 1966).

[80] See *Tucker v. United States*, 151 U.S. 164, 169 (1894); *Wheatley v. United States*, 159 F.2d 599 (4th Cir. 1946); Working Papers, p. 224; see also *United States v. Jacobs*, 473 F.2d 461 (10th Cir.), cert. denied, 412 U.S. 920 (1973) (defense applicable under 18 U.S.C. 2312, transporting a vehicle interstate, "knowing" it to have been stolen).

[81] Working Papers, p. 224.

[82] *Ibid.* As an example of one such explicitly proposed policy, with respect to marihuana intoxication, the National Commission on Marihuana and Drug Abuse, in its First Report (March 1972), recommended against permitting a "negation of specific intent" based upon such intoxication. *Id.* at 152.

[83] *Ibid.*

[From Washington Post, June 20, 1982]

LEGAL INSANITY: GONE BONKERS

GUILT IS NOT JUST A FEELING, AND INNOCENCE NOT JUST AN AGE

(By Willard Gaulin)

Shortly after the 1981 attempt on President Reagan's life. White House adviser Edwin Meese suggested that the insanity defense be abolished. Similar attacks are back now with the trial of John W. Hinckley Jr., the latest in a series of dramatic cases in which debate has centered on the insanity question.

It is not just politicians and ordinary citizens who are exercised by this issue. The community of jurisprudence—lawyers, philosophers, psychiatrists who devote their lives to the fundamental issues on which such cases rest—is also split wide open, with the divisions cutting across normal ideological lines.

It is past time to recognize that something does indeed have to change that the conditions binding psychiatry to the law today are such that confusion and contradiction are guaranteed. Contemplating the spectacle of competing teams of psychiatic "experts" contradicting one another's diagnoses in the courtroom. Alan Stone, former president of the American Psychiatric Association, likened them to "clowns performing in a three-ring circus." How did we get into this mess?

Since classic times there have been allowances which place the insane into special categories under law, but always rigidly and specifically defined. Since the 13th century the English common law has allowed that there was something essentially unjust in trying a person during the period he was insane. He would be found not fit to stand trial "by reason of insanity" and would simply be detained for trial when he had regained his senses.

Complete exculpation of actual criminal behavior can be traced back at least to 1505, when a man charged with infanticide was freed by a jury because he was insane. By the 18th century, the insanity defense was increasingly common. In 1843 the English judiciary established rules to define what was meant by insanity in the law, the M'Naghten rules have been the basis throughout most of the United States for establishing a defense on the grounds of insanity until very recent times.

The rules required proof "that at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and equality of the act he was doing or if he did know, that he did not know what he was doing was wrong."

In the 19th century psychiatrists and jurists shared the same language—and the same ignorance. The word "insane" was used by both, and it was purely descriptive. People who were called "crazy" were indeed crazy. They were different from you and me.

As medical understanding of mental processes increased, many felt that the test of right or wrong as articulated in the *M'Naghten* rules was archaic and worse unjust in light of the new "scientific" understanding of disease.

Pressure mounted to redefine the insanity defense in a way more in line with current psychiatric concepts. Therefore, when in 1954 Judge David Bazelon handed down his opinion for the U.S. Court of Appeals in the *Durham* case, it was not surprising that most progressive social thinkers considered it a major advance. Judge Bazelon proposed a new, far broader test: that "an accused is not criminally responsible of his unlawful act was the product of mental disease or mental defect."

Whereas the *M'Naghten* rules may have been stingy in denying clemency to many of the psychologically innocent, they at least defined the type and severity of defect. The *Durham* rule broadened the insanity test with a vengeance and introduced more psychiatric concepts than the criminal law could tolerate.

What is a mental disease? If you were to have examined the diagnostic headings of the American Psychatric Association in the period right after *Durham* became law, you would have found such conditions as gastrointestinal disturbance (heartburn), pruritis (itching), alcoholism, drug addiction and homosexuality listed as diseases. Is it conceivable that we would really want to exculpate all behavior that was a product of any of those conditions? And even if we were, psychiatry progressively revises its definitions of mental illness. Today none of the above is still listed as a mental illness.

Judge Bazelon, in his learned opinion in *Durham*, "In attempting to define insanity in terms of any particular sympton, the courts have assumed an impossible task." He assumed that that which was impossible for the courts should be quite possible for psychiatrists. He was wrong.

Psychiatrists, as a group, have never been able to agree on a definition of mental illness. Professional opinions range from the assumption that all human beings suffer from mental illness in varying degrees to the opposite extreme, that there is no such thing, that "mental illness is a myth."

To excuse everything, therefore, that is a product of mental disease could mean anything anyone wants it to mean. The law cannot tolerate such trival and broad conditions—not if they are to serve as excuses from responsibility. But this was the direction in which psychiatry was moving, and the *Durham* rule was caught in this movement.

By expanding the concept of mental illness we have gradually expanded the reach of psychiatry. Less and less damage to the person has to exist in either his behavior or perception to define him as mentally ill.

What, then, does insanity mean now that all of us, or at least the majority of us, have signs of mental illness? The assumption is that the legal term "insanity" must now be the equivalent of the psychiatric term "psychosis." That assumption is too simple.

The term psychosis is reserved for those individuals in whom the mental illness so fragments or destroys performance, because it so impedes either cognitive or emotional life, that the individual loses his hold on the real world. The majority are "schizophrenics," the term that has emerged so strongly in the Hinckley testimony.

Schizophrenia is the most complicated of conditions, and the one least understandable to laymen, partly because it encompasses such a divergent and dissimilar group. At one end of the spectrum is the "decompensated schizophrenic" who is delusional and hallucinatory, while at the other end one can find a "compensated schizophrenics" who may never break down. Schizophrenics have served effectively as senators, judges, heads of major institutions, presidents of schools, distinguished surgeons, psychiatrists and, in all probability, if the grapevine is reliable, president of the United States.

Add to that the fact that schizophrenia is a cyclical and remitting disease. We never describe a schizophrenic as "cured," only "arrested." We refer to the person as a "schizophrenic" even when he is not psychotic or behaving with any apparent degree of emotional distress. The schizophrenic is subject to cyclic bouts of his psychosis—he may have one "attack" and never another, or a second in 20 years, or one breakdown and never go into remission and remain psychotic all of his life.

What, then, does one call a schizophrenic either between his attacks of irrationality or before he has had his first attack? We call him a "compensated schizophrenic," or a "latent schizophrenic," or a "pseudo-neurotic," or a "borderline schizophrenic." The labeling has value for medical purposes but can be misleading because in those interstices between the acute attacks the schizophrenic is as rational as the rest of us, and besides, roughly a third of all cases may have had only one schizophrenic episode when young and never have another.

Obviously this newer, sophisticated concept of schizophrenia does not simplify the court's problems with insanity.

There are other problems. Psychiatry and the law operate from two essentially incompatible views of human nature. The prevaling vision of health and disease in psychiatry is a Freudian one, and that is particularly unsuitable for introduction into the courtroom.

Freud assumed certain postulates that are absolutely antithetical to the demands of the law. Freud saw all behavior as a result of forces shaped by past experience. Anything that one did was the inevitable product of multitudes of influences operating both consciously and unconsciously, and determined by the particular nature of one's history.

This view of behavior rejects the possibility of an isolated, chance act, and severely mitigates the concept of autonomy or choice. Whether we like it or not, it places psychiatry in the camp of determinism. All acts, according to psychoanalysis, health, sick or not sure which, share one property. They are determined by our past experiences.

Determinism is antithetical to the social concept underlying criminal law, which assumes autonomy and choice of action. It really is not important which concept is "true." Either assumption may be useful or necessary, but to assume both at the same time is logically impossible.

There is a derivative area in which psychiatry and the law stand in essential contradiction and opposition. The legal view of behavior is in essence moralistic; an action is approved or disapproved, right or wrong, acceptable or unacceptable. A person is guilty or innocent as more or less clearly defined in advance by law. But psychiatry is a branch of medicine, and in medicine nothing is wrong, only sick. A man can be no more guilty of a crime than he is guilty of an abscess. Guilt or innocence, as used in criminal law, are not functional concepts in psychiatry. To the typical psychiatrist, guilt is an emotion and innocence an age.

What are we to do? The law demands responsibility, but people are now seen as less responsible than they were once thought to be; even if behavior is not predetermined, it is certainly dynamic, multiply motivated and individual. We must respect both needs. We must maintain our distinctions between the purposes of psychiatry and the purposes of the law. Psychiatry serves the individual, and is directed at restoring him to health. The law serves the community, and is designed to secure its values and preserve its safety. The law demands an essential responsibility of its citizens. It assumes with Aristotle that "what lies in our powrs to do, lies in our powers not to do."

When Melville has his captain question the "natural justice" of hanging his beautiful Billy Budd—"a fellow creature innocent before God"—the answer is that in God's higher court he will be acquitted, but here we wear the buttons of the king.

Whether there is such a thing as true or absolute responsibility is irrelevant. Proper functioning of society requires the assumption of its existence. Each individual must conform his behavior to expected models, and if he does not he must be held accountable for his violation of the code even though occasional individual injustices may ensue.

The insanity defense was introduced to bring a compassionate, mitigating limit to the concept of responsibility, and that it can do. But the progressive liberalization of the insanity defense, particularly as exemplified by the *Durham* rule, was an ill-conceived and self-defeating attempt at benevolence that undermined confidence in the concept of insanity and threatened respect for the law. Judge Bazelon expected, and psychiatry promised, more than it was capable of delivering.

Unfortunately, while the cases in which the psychiatrist enters the court are relatively few in number, they command disporportionate public attention. Psychoanalytic theory is presented often by people with no real knowledge of its complexity, and under conditions which guarantee subversion as its aims. The courtroom antics that follow produce a general sense of frustration and often outrage in the public mind.

The belief that justice is not being done or that "people are getting away with murder" will eventually produce a more punitive attitude. It will produce the kind of ugly anger that inevitably undermines compassion and erodes understanding. Equity is an essential part of our definition of justice. The public must feel that things are working and working fairly, to support a democratic system.

Compassion is of course also a component of our concept of justice and we must allow some exemptions from responsibility to satisfy a common sense of decency, but they must be limited and at an extreme, and the courts—using their sense of the truth not the psychiatrist's—must decide.

In 1760 an English solicitor general said, "My Lords, in some sense, every crime proceeds from insanity. All cruelty, all brutality, all revenge, all injustice is insanity. There were philosophers, in ancient times, who held this opinion. . . . My Lords, the opinion is right in philosophy but dangerous in judicature. It may have a useful and noble influence, to regulate the conduct of men; to control their important passions; to teach them that virtue is the perfection of reason, as reason itself is the perfection of human nature; but not to extenuate crimes, not to excuse those punishments which the law adjudges to be their due."

The *Durham* ruling and the law that issued from it will not work. The assumption that modern psychiatry would offer a clean and accurate guideline to the limits of responsibility has proved false. Psychiatry in its present state cannot and, given its present direction, will not be able to do so in the future. As long as psychiatry is tied to a deterministic model it will never accommodate itself to the kind of responsibility that the law must insist on. Psychiatrists can indicate limits of rationality, cognition and perception, and that is about all.

We must not, however, abandon the insanity defense. There are always those clear and evident cases that demand exculpation. And there are those fuzzy cases at the borders where the jury ought to have a right to express its compassion without violating its sense of duty.

The *M'Naghten* rules, with all their inadequacies, remain the best we can hope for. They are blunt enough instruments to make good law. They are sufficiently ambiguous to allow a juror to interpret them according to his heart rather than his mind alone; and they do clearly exculpate the most obviously nonculpable of the mentally ill. It may not be the greatest endorsement to say they do less harm—but it is not the worst either.

[From the New York Times, June 21, 1982]

How Psychiatry Can Aid Courts

(By Garland Y. DeNelsky)

Cleveland.—The trial of John W. Hinckley Jr. for the attempted assassination of President Reagan has raised serious questions about the credibility of psychiatric testimony in the courtroom.

A seemingly endless parade of psychologists and psychiatrists and appeared in the Hinckley case in recent weeks. These "experts" have provided both the jurors and the public with contradictory interpretations of the defendant's state of mind before, during and after he shot the President.

With Mr. Hinckley's violent act so clearly recorded on videotape, the defense has attempted to build a strong case that the should be found not guilty by reason of insanity.

To achieve this, it has hired its own mental-health authorities, who have willingly and eagerly discussed the nature of schizophrenia, incoherent thinking and an inability to distinguish between right and wrong.

The presecution's witnesses from the mental-health community, on the other hand, have sworn on their professional judgment that Mr. Hinckley was stable, sane and fully able to appreciate the meaning of his behavior.

The jury, one hopes, will be able to sort through the morass of conflicting assertions and correctly decide which group of experts seems more plausible.

Opposing medical views are commonplace in our system of justice. But the marriage of psychiatry and law, especially in "not guilty by reason of insanity" cases such as Mr. Hinckley's, is awkward at best and absurd at worst.

When psychiatrists and psychologists are thrown into a competitive legal arena supercharged by hype and publicity—like the Hinckley courtroom—the testimony often becomes confusing.

Rather than unbiased discussion, which is needed, we hear exaggerated arguments between mental-health specialists, who desperately want to "win." This is not the way to help the court arrive at a fair and objective decision. And it doesn't do much for the image of psychiatrists and psychologists, either: As the public becomes aware of the many contradictions and discrepancies in the testimony, it may conclude that the "experts" aren't experts after all, but, instead, charlatans or mercenaries.

Many of these problems could be avoided if we changed the manner in which psychiatric and psychological testimony enters the legal system.

Let each mental-health profession nominate several dozen experts in each state who are knowledgeable in the legal area and respected by their peers. These nominees would then constitute a "pool of expertise" that would be available to the courts.

In the Hinckley trial, for instance, a panel of several mental-health witnesses would have been drawn from this larger peer-selected group to serve as friends of the court—not as "hired guns" paid for by the prosecution or defense.

These professionals would indepenently have examined the accused and would then have met in private to arrive at a conclusion. Their findings would have been presented to the jury, in whose hands the ultimate verdict lies.

Such a system would offer several advantages. It would produce testimony more conducive to sound judicial decisions by bringing together experts who would work as a team rather than as adversaries. This interaction could also lead to some long overdue advances in forensic psychiatry and psychology—most specifically relating to the complex issues of personal responsibility for criminal behavior. And, last, this proposal might help restore the credibility of mental-health professionals, who can play a valuable role in the criminal justice system.

Senator **Biden**. I'd like to comment on your last statement about how you think we should proceed. Quite frankly, I think this is an extremely unusual hearing. I have been in the Senate almost 10 years and practiced law before that. I was a trial lawyer and I stood before juries like part of the jury in front of us. I have never thought that I would be dissecting a case with the jurors after the fact and before a Senate committee.

Although the jurors may very well act in a way that is responsible in terms of what questions they decide to answer or not to answer, I hope as this hearing continues we Senators will act responsibly as attorneys and know what to ask and what not to ask.

I am not sure whether the jury system is on trial here or whether we are talking about the insanity plea. Take the question, for example, of whether we should have unbiased experts—and I have never found one of those things—come in that neither the prosecution nor the defense is in charge of. I wonder how you get that panel together, who chooses them, and how complicated the psychiatric testimony should be.

Keep in mind there are equally and, quite frankly, more complicated cases we ask juries to deal with. We ask them to deal with the swine flu case, for example. They had medical testimony from every conceivable source on the impacts upon a drug upon one's system in a way that all experts disagree on. We have cases that are still pending in which we ask juries to decide whether or not the nuclear blast of the 1940's in fact caused physical illnesses in the soldiers who watched them. We expect juries to do that. We have extremely complicated antitrust cases in which we do not insist that there be business people on juries who have any background in the area. They come in and make judgments in matters of hundreds of millions and sometimes billions of dollars. So, I hope we keep what we are doing here in perspective.

Let me ask one question, which is in line with how the chairman suggested we proceed.

Under the system in which you participated the choices you have were limited, including guilty, not guilty by reason of insanity. That was communicated to you at the end of having heard all the testimony. You heard an awful lot of testimony. You sat there for days and days. Prosecutors and defense attorneys paraded before you individuals who suggested that this man was either sane or insane. But up to that point you did not have any definition unless you were attorneys already or happened to be particularly schooled in the law. You had no idea what the actual definition of insanity was for purposes of the law.

Did any of you have any idea what standard you were going to be asked to judge the defendant upon?

Ms. BROWN. No.

Senator BIDEN. I see the heads shaking no. I assume that means none of you did.

At the end of the case, after you heard all the testimony, after you went back to your rooms and after you laid in bed about to go to sleep, thinking about what you had heard the day before, after all of this was over, a judge sat before you and said: "Now you are going to take all of the information that you heard and your perceptions of who was right and who was wrong and who was more persuasive and who was less persuasive and fit them into this standard." And then he proceeded—which I will not, in the interest of time, do—to read the charge to you as to what you are obliged as good Americans under the law to determine: Whether or not everything you heard fit into the little box that the judge puts out there.

The judge, in fairness to him, put out in that little box only what the Supreme Court through stare decisis has indicated what should be there or what we as legislators write into law and say should be put in that little box.

My question is this. Did any of you feel, up until the time, that you heard what the judge told you what your responsibility was prior to that time, did any of you in your own mind say: "I'm going to have to find this fellow guilty;" but after you heard the judge, say: "Gee, based on what that judge told me, I guess I can't do that?" Did any of you reach any conclusions like that? Or did you even before you heard what the judge had to say, decide that this fellow really was insane? As the testimony developed did any of you at one point say, "Yes, they proved it to me, he's insane"—even before you heard from the judge?

Mr. COFFEY. No, I was undecided.

Senator BIDEN. You were undecided until you heard from the judge. Is that correct?

Mr. JOHNSON. Yes.

Senator BIDEN. So, what made you make your decision, what made you come down on one side or the other was when the judge said: "Now here's what you must do?"

Ms. COPELIN. Not me it didn't.

Senator BIDEN. Why do you not tell me, Ms. Copelin?

Ms. COPELIN. I thought he was guilty. Like I said, I would have still been guilty. You have got to understand—you don't have one of those forms, do you?

Senator BIDEN. I beg your pardon?

Ms. COPELIN. The verdict form.

Senator BIDEN. I don't have one in front of me, no.

Ms. COPELIN. See, when you are dealing with something like that, you just cannot say yes and no when you know something else is wrong. Now, he was not to the degree that he was a raving or in a fit or rage or bizarre thing; it was not like that. He was more or less—he was genius in his act, he was cool with it. He was like one day he would do something wrong, and the next day he would try to correct it. Then he would come right back, do it again. I am trying to get you to understand my picture.

We know from his actions there was something wrong with him mentally.

Senator BIDEN. How about if the judge had said——

Ms. COPELIN. Uh-huh. It's all in that—the judge, from my part, I would not even have to deal with him. I would deal with the evidence. I mean, I would take him into consideration. But for what I felt and everything, with the evidence and knowing and listening to testimonies, it would have been different not only with me, with the rest of them, if you would have that form, if it would have been different.

Senator BIDEN. I understand what you are saying. It is exactly what I am trying——

Ms. COPELIN. I know what you are saying, you know, the instruction by the judge.

Senator BIDEN. How about if the judge, before you walked out of the courtroom for the last time, said: "Now look, the only way under our law you can find this defendant not guilty by reason of insanity is if you believe that he believed, instead of squeezing the trigger of a gun, he was squeezing lemons?"

Now, you are smiling, but it is important. I will tell you why——

Ms. COPELIN. I know.

Senator **Biden**. I will tell you why. Some of us believe we should change the law the following way. We should change the law to say that the standard would be what they call sometimes in the law mens rea. That means did the defendant know what his acts were and the consequences of those acts.

To put it another way, it is explained sometimes in legal treatises. It says that, in order to find a man not guilty of strangling his wife to death because he was insane, it is not sufficient to say that he was momentarily upset or that he had an irresistible impulse or the devil made him do it or he had a childhood background that gave him no social conscience. None of those things. What you would have to prove is that, when he grabbed her neck, he was not squeezing her neck, he thought; he thought he was squeezing lemons. He did not realize what he was doing. But, if he realizes what he was doing—even though he had an irresistible impulse to do it, even though Jodie Foster was in the back of his mind—and if the prosecution can prove, A, he knew that was his wife and, B, he knew these were his hands and, C, he knew he was squeezing his wife's neck to choke off the air to kill her, then, no matter how messed up he might be—to use the vernacular—no matter how screwed up he may be—to use the vernacular—no matter how upset he may be, if he knew those things, he is guilty.

Now, this is the reason why I bother to ask you if you all insist—you know better than any of us—that what the judge tells you at the end doesn't make much difference, then in fact what we do up here in terms of changing the law does not make much difference. The only thing we can do in this committee, and the only thing the U.S. Senate can do is change what the judge says at the end. That is the only thing we can do. That is the only way we can change the law. We cannot perfect the jury system. We cannot reach in and cull out people's prejudices or people's instincts or people's predilections. We cannot do that. We cannot see through jurors' eyes. But we can tell a judge what he has to say.

Ms. **Copelin**. And you can change that form.

Senator **Biden**. That form. That is right. We can change that form because that——

Ms. **Copelin**. If you change that form, sir, I believe, if you change that form, you will not ever be disappointed in the jury because you will not have to.

Senator **Biden**. Well, I am not disappointed in you, just for one. I am serious. I am not disappointed in you.

Look, no matter what, folks, we have precious little moral courage in this country these days, precious little. And you all obviously knew when you stood before that judge the last day and the foreman read the verdict, you all knew exactly what the response would be of the rest of your neighbors and the rest of America. You all knew you were in for a world of hurting. You all knew you would be in for some real castigation.

But let me tell you something. Whether or not I would have reached the same verdict, I can't say because I was not sitting in your skin at the time, and I did not hear all the testimony. But I want to tell you something. You all have a whole heck of a lot of gumption. Knowing the castigation you would receive, to stand there and do what you believe was right under the law to do. That is called moral courage. If more Senators had it, if more press people had it, if more Presidents had it, if more leaders had it, we would have a better world. You have a lot of moral courage. You have nothing to apologize for.

Anyway, I will not pursue it any further because I do not think there is much I can pursue and not go beyond the bounds of what I think is appropriate to ask a jury about a case that has just concluded, Mr. Chairman, except to say that I firmly believe that we have to change the standard. I think the standard will only be changed in a way that would significantly alter what the public believes to be outrageous outcomes in cases. With all due respect, it is not by changing the burden of proof, it is not by deciding whether or not expert witnesses can or cannot come in, not by fundamentally tampering with the jury system, not by taking cases like this out of the jury system and putting them only before judges, but only by changing the standard.

I believe the standard should be, if the defendant knew what in fact they were doing, regardless of why they did it, then that person should be found guilty under the law. If in fact they thought that the devil made him do it, that could be a mitigating circumstance in sentencing but not in whether or not they are guilty or not guilty.

That is why I pursued this line and took so long to explain why I think it is important to you jurors.

I say publicly again you have nothing to be ashamed of. You have shown a great deal of moral courage doing what you thought was right.

Senator SPECTER. Thank you, Senator Biden.

As a number of us have said a number of times, we all commend you for your work on the jury. As was said at the opening, we are pursuing this subject in an effort to see what changes, if any, ought to be made in the law. There is in no sense any reflection upon what the jury did or what the process has resulted in. You have done your duty, and you have done your job. The judge has complimented you. I think we all join with what Senator Biden has said about commending you for your participation.

Our purpose is a totally different one. That is to see what we can learn from the case in which you participated.

I would like to move at this time to the issue of the burden of proof, having discussed at some length the question as to what would be the appropriate standard for legal insanity. The issue then arises as to the question of burden of proof. As Senator Heflin has outlined to you, the traditional standard in Anglo-Saxon jurisprudence has been that, when the defendant asserts a defense of insanity, that the defendant has the burden of proof that he is insane. Most jurisdictions in the United States, most States require that burden to be assumed by the defendant. In fact, there is a statute which governs the District of Columbia trials, which are on a different jurisdictional level. The District of Columbia has a rule that insanity has to be proved by the defense and that in the course of this trial there was an extended legal argument made to Judge Parker as to which standard of proof would govern.

One of the issues which is going to be before the Congress, and is contained in legislation which I introduced on Tuesday, is to change the burden of proof to require that, where there is an insanity defense, the defendant establish that by clear and convincing evidence.

At this time I would like to really proceed with what Mr. Johnson said, that nobody knew what was in his head that day. That is in the notes I wrote down when you were responding on the first round of inquiry.

The first thing I would like to know is whether any of you has had any experience or exposure to the issue of burden of proof before you came to this particular trial.

It is a question which comes up in high school debating, for example. But nobody had ever faced up what the burden of proof was and how a controversy was decided if one side or the other did not assume and fulfill the burden of proof?

Ms. Copelin. No.

Senator Specter. On the issue of burden of proof, let me begin by asking you, Ms. Brown.

What did you understand from the judge's instructions on the burden of proof?

Ms. Brown. My understanding is that there had to be proof from, well, if you found—could you give me a clarification?

Senator Specter. Yes. At one point Judge Parker came to the issue of burden of proof. He told you that it was up to the prosecution to establish the burden of proof. I would like to know what you understood was meant by the burden of proof, what that did to the issues you had to decide.

Ms. Brown. The prosecution had to bring forth all the proof that they could to prove that this guy was sane, OK? I feel that the prosecution did a good job. They went all out. I mean, they brought in every witness that had communicated with him throughout, let us say, the month of March or right up to the incident. But, still, putting the burden on them to prove that he is insane was a hard job, because we all have some sort of mental illness because we all go through some stress, strain, and depression. This is basically what the defense was falling on anyhow. We all go through this. So, for them now to prove that this guy wasn't insane, it was hard, even with the tests like CT scan tests, which really are supposed to be irrelevant. If they were to take CT scan tests of some of us in here, we would look like we have a mental disorder. And I think it was hard on them to try to prove this.

Senator Specter. Ms. Brown, let me read to you the two burdens of proof. I will not put in the third but start with two.

One is a burden of proof beyond a reasonable doubt. That has been the standard in a criminal case where you are going to take somebody's liberty or life. It is a case brought by the state, the government against an individual, as *United States* v. *Hinckley*. It is a high burden of proof. It is proof beyond a reasonable doubt.

Reasonable doubt is defined this way. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

Now, there is another standard of proof in a civil case. There is an automobile accident. One driver claims injuries, damages from the other driver. There must be proof by what is called a preponderance of the evidence. And that is the juror must believe from the evidence that it is more probable than not that a certain fact exists.

Now, if Judge Parker had said to you all the Government has to do is prove the case by a preponderance of the evidence, more likely than not instead of beyond a reasonable doubt, do you think that would have made any difference in your ultimate decision?

Ms. BROWN. Well, my ultimate decision, as I stated, I always thought he was guilty. I really gave in to what my decision really was, not the evidence itself made my decision, because by the evidence he was guilty.

Senator SPECTER. So, the definition of burden of proof would not matter.

Let me turn then to Mr. Coffey, if I may, Mr. Coffey. You had a view of insanity. That was your thought, that the evidence showed that.

If the judge had said on the standard of proof that it was by a preponderance of the evidence more likely than not, more probable than not, sort of like 51 percent. You can define preponderance of the evidence in percentages. You can say it is a 51 percent likelihood. You cannot define reasonable doubt, beyond a reasonable doubt percentagewise. But, if the judge had said you just have to find that the prosecution has proved insanity by a preponderance of the evidence instead of beyond a reasonable doubt, do you feel at this point that would have made any difference in your ultimate decision?

Mr. COFFEY. I really do not think so at all.

Senator SPECTER. You really just could not say?

Mr. COFFEY. I really could not say really.

Senator SPECTER. Does anyone have a feel for that? Would it have made any difference to anybody? Ms. Copelin, what do you think?

Mr. JOHNSON. All I can say about that, I cannot say it. It may have made a difference, but I cannot say it would have.

Senator SPECTER. Mr. Johnson, you think it may have, but you cannot say. Mr. Lassiter, do you have any feel for it?

Mr. LASSITER. No.

Senator SPECTER. Let us go to the other question. Let us start on you with this one, Mr. Johnson.

You said that no one knows what went on in his head that day. I wrote that down when you were testifying earlier. If Judge Parker had said the burden of proof is on the defendant to establish his insanity by a preponderance of the evidence—the standard is not to make the defendant prove anything beyond a reasonable doubt. But, instead of having the judge say that the burden is on the prosecution to prove the case beyond a reasonable doubt, the judge had said the burden of proof is on the defendant to establish his insanity, and if the defendant does not satisfy you by a preponderance of the evidence that he was insane, then you should convict him if you find all the other evidence against him. Would it have made a difference to you if the burden of proof had been placed on the defendant?

Do you understand my question, Mr. Johnson? I see you pausing and hesitating.

Mr. **Johnson**. I do not think I can answer that one.

Senator **Specter**. Excuse me?

Mr. **Johnson**. You said the burden of proof was laid upon the defendant?

Senator **Specter**. Yes.

Mr. **Johnson**. Would it have made any difference?

Senator **Specter**. Yes.

Mr. **Johnson**. With my verdict would it have made any difference?

Senator **Specter**. Yes. Considering that you had all the psychiatric evidence, after the case was all over and you heard from the psychiatrists on both sides, and there was a lot of evidence, then you had to decide a conclusion, Did the fact that the prosecution had the burden of proof beyond a reasonable doubt influence you in saying that, if they did not prove his insanity, then you were going to acquit him?

Mr. **Johnson**. I do not think it would have made any difference.

This burden that we are talking about was laid on the shoulders of the jury. Believe me it was heavy. One of the reasons was the pressure we had on us, the other knowing that this man John Hinckley had made an act on the President of the United States.

So as far as the burden on the defendant or the prosecution made no difference, because you would still have to look at the evidence and the facts.

I did not mind serving as a juror but not like this one. Maybe a civil case. I never wanted to be on the *John Hinckley* case. But I was there and I was there by being honest. I believe I was honest with the judge in the interview and I kept my honesty all throughout the trial. I kept an open mind and used my commonsense and common knowledge.

In the deliberation I still kept my honesty and my personal feeling out of it. I kept my nose down to the facts. Some people said that John Hinckley manipulated the jury. I hope that is not the case because if that is true he is the best actor I have ever seen because I think he really was insane.

Senator **Specter**. You do not think it would have made any difference.

Ms. Copelin, what is your feeling on that subject? Not only for yourself but perhaps for the other jurors, as you would sense the formulation of that issue.

Ms. **Copelin**. As for the way the—to get back to my—in order to stick to my guns, I would say this. It would not make any difference. But, like I say, when you have a space to put it in, you know, it would clear it up.

Senator **Specter**. It all boils down to the form you were given in terms of your——

Ms. **Copelin**. And whichever way it would be, regardless of who was taking responsibility for the burden, to me. If it was the form—I believe it is better for the defense to prove. But, either way it was, if the form was correct.

Senator **Specter**. You say it would be better for the defense to have to prove it?

Ms. COPELIN. Yes, I think he should.

Senator SPECTER. Why do you say that?

Ms. COPELIN. Because it puts the prosecutor to too much burden. What I am saying is this. If a person—like for this trial. If a person is guilty, if a person is insane, let them prove, yes, I'm ill and I'll show you beyond a shadow of a doubt I'm ill.

The prosecutor, they did their job, right. Now, when it comes down to the thing, we were supposed to go whatever way we wanted. But the prosecutor could not deal with the fact on account of—he put everything there for us, but he could not deal with everything because the way he was up there by having a mental thing.

Senator SPECTER. He could not deal with everything because of why?

Ms. COPELIN. By not being able to be able to have another block where we could separate the mental illness with the act so we could get——

Senator SPECTER. It comes back to the block on the form?

Ms. COPELIN. That is right.

Senator SPECTER. Mr. Lassiter, do you think that it should be up to the defendant to prove his insanity? Or do you think that the law should require the prosecution to prove sanity?

Mr. LASSITER. Well, I really don't know because it seems to me that one could prove it just as good as the other one. So, I don't see where it should be on the defense more than it should be on the prosecution, or it should be on the prosecution more than it should be on the defense.

Senator SPECTER. You don't think it ought to be on one any more than the other.

Mr. LASSITER. That is right. I do not. Because it would be just as much of a problem for one to try to prove. If the defense had been trying to prove to him that he was insane, see, it would have been just as hard for them to prove that he was insane as it would be for——

Senator SPECTER. How would you handle it then? You would just let both sides put on the evidence but you would not say that the judge ought to say the burden of proof is on any special party?

Mr. LASSITER. Well, I wouldn't say that. What I am saying I don't think it should be on one any more than the other.

Senator SPECTER. Well, if it should not be on one any more than the other one, would you put it on either one?

Mr. LASSITER. I think what I am saying, like the case, OK—now, the one that was trying to prove that he was sane at the time, know what this is the point for insanity, OK, the prosecution was going for sane, so, at that time I think it should have been more on the prosecution to prove that he was sane than it was for the defense to prove that he was not.

Senator SPECTER. Let me ask this one general question before deferring to Senator Heflin.

Did it make any difference to you what the judge had to say about all this burden of proof business? Did anybody think that mattered? Ms. Brown, did you think it mattered?

Ms. BROWN. Well, on the last question, which you did not ask me, I wanted to say this. I feel that the defense should have to prove that he is insane because of the fact we know that he was guilty. For him trying to get out of it going on an insanity case, the burden should be on the defense because the proof is there that he is already guilty.

Senator **SPECTER**. Anybody have any feel for the question as to what this whole burden of proof meant in your deliberations and in your ultimate decision in the case? Mr. Coffey, did it make any difference to you at all what the judge had to say about the burden of proof?

Mr. **COFFEY**. Not at all, not at all.

Senator **SPECTER**. What essentially did the matter come down to? Was it the definition of insanity? Was it the testimony of the psychiatrists? If it was not the burden of proof issue, what did it come down to?

Mr. **COFFEY**. To the evidence.

Senator **SPECTER**. To the evidence.

Mr. **COFFEY**. The evidence.

Senator **SPECTER**. The psychiatric evidence?

Mr. **COFFEY**. The psychiatric evidence, all of it combined.

Senator **SPECTER**. Senator Heflin?

Senator **HEFLIN**. Generally, in the issue of the burden of proof, a number of different things, but two things come to my mind generally when I consider burden of proof. One, who starts on an issue, and then who answers, and then who comes back and has a fact of ending. That is generally the issue of who should start talking about whether or not the man is sane or insane and who should end up, which largely deals with the burden of proof.

Would it have made any difference to you in this case whether the prosecution started out talking about insanity or sanity or whether or not the defendant started out with his witnesses talking about sanity or insanity? Would it have made any difference to you in this case in that regard?

Mr. **COFFEY**. No.

Senator **HEFLIN**. Usually in regard to a burden of proof it is largely whether or not they establish what we call a prima facie case. That is, they establish all of the elements. After a prima facie case or all of the elements are established then you have the issue of whether there is sufficiency of evidence. I gather in this case that you all heard from many, many psychiatrists on both sides of the aisle, both sides of the bench, from the defendant and from the prosecution. Did you all feel that there was any area of evidence that was missing?

Ms. **COPELIN**. No, I do not.

Senator **HEFLIN**. Did they cover it thoroughly?

Ms. **COPELIN**. I believe everything was covered thoroughly. It was there.

Senator **HEFLIN**. Really in this case the burden of proof would not have made much difference one way or the other, if the issue is thoroughly covered, there are no voids other than whether or not there was some advantage to be placed on who starts and who finishes. Do you think there was any advantage by having one side to start on the evidence and finish it?

Ms. **BROWN**. No, because even though the defendant brought their psychiatrists out first—it really was the cross-examination that really started me to thinking. When they started cross-examining their psychiatrists, it brought out a lot of things that you did not hear from the direct examination. So, regardless of who was first, defense or the prosecution, it really would not have a bearing because you will eventually get the full stories from either side.

Senator **Heflin**. I sense that there is a difference among the various individual jurors as to whether or not your minds were left in a state of doubt or whether or not it was proven to you beyond a reasonable doubt. I gather that from earlier questioning.

Would the obligation on the part of the prosecution to have to prove to a lesser degree than a reasonable doubt have made any difference to you in this case?

I believe that is all.

Senator **Specter**. Thank you very much, Senator Heflin.

At one point the jury requested a dictionary as the reports came forward. Is that correct?

Mr. **Coffey**. Yes.

Senator **Specter**. What was the purpose of requesting the dictionary?

Mr. **Coffey**. To find out just for ourselves was all poetry fiction.

Senator **Specter**. Excuse me?

Mr. **Coffey**. One doctor said that all poetry was fiction, and I do not believe all poetry is fiction. That is the reason for the dictionary.

Senator **Specter**. That was the only——

Mr. **Coffey**. That is the only reason.

Senator **Specter**. Had no interest in defining any of the psychiatric terms?

Mr. **Coffey**. No.

Ms. **Copelin**. No.

Senator **Specter**. Did you feel the need at any time during the course of the deliberations for more definitions on the complex psychiatric terms which were presented to you?

Mr. **Coffey**. No. They made it clear to us. They put it down in all lay terms when they testified.

Senator **Specter**. Would it have been useful to you if you had had notes or writings that you could have referred to in the jury room in assisting you to come to your verdict? There is a rule that we do not permit jurors to make notes or have writings with them.

Ms. **Copelin**. Pardon me. Are you speaking about our personal notes?

Senator **Specter**. Yes. If you had had an opportunity to have notes with you——

Ms. **Copelin**. Do you mean while we were in the box?

Senator **Specter**. While you were in the box. That is a question which has been the subject of a great many inquiries as to whether it would help jurors perform their function when they get back into the jury room after they have been weeks on trial if it would be useful.

Did you ever find that you had forgotten something or would like to have made a note, as you do in everyday life?

Ms. **Copelin**. We did not really need any notes because we really had more evidence than really was needed, plus the different psychiatrists and everything. They were drilling us constantly about, you know, trying to instill in our heads that something was wrong with him. And they broke it down to the last term. Plus the evidence, you know, that was there.

So, we did not need any notes because he wrote enough.

Senator **Specter**. Does anybody feel any differently about whether notes would have been helpful to you in the jury process?

Ms. **Brown**. I feel maybe notes would have helped somewhat. Evidently—I am not stating what it is, but we made another—we sent out a note for something else. By us doing this, I think notes probably would have been the best thing.

Senator **Specter**. You say at one point you sent out a note for something else?

Ms. **Brown**. Yes. But I am not—since it was not mentioned.

Senator **Specter**. What was that for?

Ms. **Brown**. The transcripts. I know we weren't but we did send a note out for a transcript. So, if we hadn't, evidently we wouldn't—well, if we weren't sure of all the testimonies, we really wouldn't have thought we should have sent out for transcripts to memorize some of the testimonies.

Senator **Specter**. Were you looking for something specific?

Ms. **Brown**. Well, I guess we wanted to sum up some of the testimonies with some of the evidence so we really could get our full viewpoint. But we were denied transcripts.

Senator **Specter**. You were not permitted to have those transcripts.

Ms. **Brown**. Right.

Senator **Specter**. You heard Senator Biden's definition as to what he would define legal insanity to be, which was somewhat different from that long definition that I read to you earlier that Judge Parker read to you. I think the essence of what Senator Biden said was that he would hold someone criminally responsible essentially if he knew what he was doing.

If that had been the standard in Mr. Hinckley's case, would that have made a difference to you, Mr. Johnson?

Mr. **Johnson**. How about repeating that question?

Senator **Specter**. Yes. If the standard on legal insanity had been, simply stated, if Mr. Hinckley knew what he was doing as opposed to that long definition that the judge gave you and that I read to you, would you have had a different verdict?

Mr. **Johnson**. I think I would if I thought that he really knew what he was doing.

Senator **Specter**. Did you feel that he really knew what he was doing?

I would like to ask you a question just on the law, but when you come back and say if you thought that he really knew what he was doing, then it is necessary to say if the law was he is guilty if he knew what he was doing, then what you found the facts to be, would that lead you to the conclusion that he was not insane?

Mr. **Johnson**. No, it did not lead me to the conclusion that he was not insane.

Senator **Specter**. You say you don't think so or you don't know?

Mr. **Johnson**. No, it did not lead me to the conclusion that he was not insane.

Senator **Specter**. There has been a definition in S. 818, which is our way of denominating a bill, introduced by Senator Hatch, which says this. Instead of a long definition, if the judge said to you it shall be a defense to a prosecution under any Federal statute that the defendant as a result of mental disease or defect lacked the state of mind required as an element of the offense charged, then he shall be acquitted.

Would that have made a difference to you?

The judge charged you in the jury that in order for you to convict, in addition to all of the other factors in the case, that you had to find intent on the part of the defendant. You had to find that it was intentional act on his part. If the judge, instead of giving you the definition of insanity, which he had, had said that intent required a state of mind which required that there not be mental disease or defect but had limited the instruction in the portion of his charge on what intent was, would that have made any difference to you?

You seem to have a response, Ms. Brown.

Ms. **Brown**. Mr. Hinckley did not have a mental disease. All of the psychiatrists and tests proved that he did not have a mental disease. He had a mental disorder. That is the difference from a mental defect.

I think it would have made a difference, too, if we, I guess, if people realized that could have a chance to be acquitted. I don't really—and maybe they don't agree with me, but I really don't believe that some of the jurors knew that he had a chance of getting out of this. If it is proved that he is not, if he would not harm himself, will not harm anyone, in 50 days, although he probably won't get out in 50 days but he's got a chance of getting out in maybe a couple of years, I really don't believe all the jurors understood this. Because I had some doubt within my mind myself on what would really happen to him if he is found insane or if he is found guilty. And I don't think a lot of people stopped and thought about that neither.

They might have something else to say about that.

Senator **Specter**. Does anybody else want to respond to that, as to what the consequence would be, as Ms. Brown has just outlined it?

Mr. **Coffey**. We really weren't there to judge what consequence would come out. We were there to weigh the evidence and facts. That wasn't really our problem to deal with.

Senator **Specter**. Ms. Brown has made a distinction in her mind between a mental disease and a mental disorder. Would it have made a difference if the judge had said you have to have a mental disease in order to be insane as opposed to you have to have simply a mental disorder?

Mr. Lassiter, you are nodding your head no. Mr. Coffey, you are nodding your head no. Mr. Johnson, would it have made a difference to you?

Mr. **Johnson**. No.

Senator **Specter**. How about you, Ms. Copelin?

Ms. **Copelin**. I don't——

Senator **Specter**. Let me ask you just one final question. You have been very patient. There are a great many things we could ask, but I think this is probably a good time to bring your participation to a close.

What the law seeks to do is to establish rules of conduct to protect society as a whole and at the same time to protect the individual. We define the conduct in a variety of ways. We try to limit acts of violence where society or people are victimized by acts of violence of individuals. We try to protect individuals so that their constitutional rights are insured and that they are treated fairly.

One of the points of evaluation which I think the Congress is going to grapple with would be how many people would qualify as legally insane under the standards of the *Hinckley* case if it turns on mental disease or mental disorder or mental defect, perhaps a personality disorder. And you heard a great deal of testimony about schizophrenia. One of the newspapers contained a description. When you handle schizophrenics, the newspaper article said, you include Senators, probably Presidents.

What is the standard? How many people in our society would be excluded from responsibility for their conduct if we acquit on the grounds that we say Mr. Hinckley was entitled to be found not guilty? We are going to have to decide how big an avenue we are opening by the standards in this case. And that probably is the bottom-line question which the Congress will have to deal with as a matter of public policy.

You may be interested to know that the Congress has never legislated on the issue of insanity. We have never defined it. The case started with *M'Naghten* in 1843 in the House of Lords, and there have been many interpretations in American courts. But the Congress itself has never defined what is legal insanity. I think from this case we are going to try that. Whether we will or not remains to be seen.

We are going to have to decide how many people, as best we can determine it, would be able to qualify as legally insane. I would be interested in how you feel about that. Ms. Brown, let us start with you. We will take ladies first, and this is the final round unless Senator Heflin has more questions.

Ms. Brown. How many people, you say, that last part?

Senator Specter. Yes, well, it is a matter of speculation. The psychiatrists, for all their wisdom, say they cannot predict human behavior. Congress will have to make a judgment. The courts have to make a judgment. And in the judgment we are saying that we live in a country with 200-plus million people. We have to say what percentage would be able to plead legal insanity as Mr. Hinckley did. So, how big a door are we opening for people not to be responsible for their conduct? That is the question which we have to decide. We try to define it in a way which accommodates to all the interests. We do not quarrel with the decision in *Mr. Hinckley's* case. That was the law. That was done. And now we have to move on to see if we ought to make some changes.

A critical question will be how responsible can we hold people to be. If Mr. Hinckley can successfully plead insanity, how many other people can do the same thing and not be responsible for their acts of violence?

Ms. Brown. There cannot be a percentage. What is has to be is it definitely has to be proven. It has to be proven, like you say, beyond a reasonable doubt where you definitely can say he really—I go with the mental disease, OK, or some sort of way that his actions could really be shown not just by what he says, what he has written, but by his acts.

A lot of people say, well, a normal person would not shoot the President. Yes, but look at it this way. For the purpose that he did this, I guess you would shoot him, too, you know. He is thinking about fame and glory and money. He is going to get all this, you know.

Senator SPECTER. Are there many people who would like fame and glory in this world?

Ms. BROWN. Yes, there are a lot of people, but I do not think they would go to the degree he went to.

Senator SPECTER. If it is an excuse to shoot somebody to want fame and glory, how many people can be excused?

Ms. BROWN. No one should be excused. That is the way I feel. If they go out here, shoot or commit a crime, they should not be excused for it. If there is something wrong with them, treat them but make them pay. We have too many people that are victims of these crimes, and people are just walking away from them. And I think you should pay for your crimes.

Senator SPECTER. Ms. Copelin, aside from that form, which we will address our attention to, do you have any suggestions as to where the law ought to go, if changes should be made, if any?

Ms. COPELIN. No, not really.

Senator SPECTER. Do you think that under the standards of insanity as it was applied in Mr. Hinckley's case that it opens the door too broadly for excuses for someone's conduct?

Ms. COPELIN. Oh, there's no excuse. There's no excuse at all. And I think that, like I stated, if a person is mentally ill, have them get the correct treatment and then also have them punished for their crime.

Senator SPECTER. Mr. Johnson, would you have any recommendations to the subcommittee as to what changes ought to be made from the experience that we have had on this matter?

Mr. JOHNSON. No, I don't. I do not have an idea what changes should be made.

I will say this. If they did not hold Mr. Hinckley in some institution any longer than 55 days, I would feel bad about it.

Senator SPECTER. I'm sorry? I did not understand that.

Mr. JOHNSON. If they didn't hold Mr. Hinckley in an institution someplace more than 55 days, I would feel bad about it. I think I would feel a little guilty.

Senator SPECTER. If they didn't hold Mr. Hinckley more than 55 days, you would feel bad about it? You would feel a little guilty? How long would you hold him?

Mr. JOHNSON. Well, I think they should hold him until he can be able to come back out here and cope with reality. Maybe forever.

Senator SPECTER. One of the issues, Mr. Johnson, that the law faces now is that, when Mr. Hinckley was not proved sane beyond a reasonable doubt, at the same time the legal standard may be that he is sane by a preponderance of the evidence. You have to reach a score of 75 to show that he is sane beyond a reasonable doubt but only 51 to show that he is sane by a preponderance of the evidence. He could be legally insane under the rule in this case and civilly sane to walk out the same day.

That is the issue which comes up in who has the burden of proof and by what standard, if Mr. Hinckley now needs only to prove by a preponderance of the evidence that he is not insane.

Mr. Coffey, would you have any recommendations to the subcommittee on this subject concerning the administration of criminal justice?

Mr. COFFEY. Not really.

Senator SPECTER. Mr. Lassiter, would you have any suggestions for improvements?

Mr. LASSITER. Well, no, not really either. As far as like Ms. Brown was saying a while ago about fame and glory, I think you shouldn't even think about that. I think that is like when you bring your personal feelings in. I do not think you should even think about that.

Your verdict should be on your—I mean, you should have a clear mind, a conscience, to come to a verdict, not thinking about what a person wants. Anybody wants fame and glory, but I do not think that should come up when you are trying to look at a decision or verdict. I do not think your personal view should come in at all.

Senator SPECTER. You don't think what should come in at all?

Mr. LASSITER. You bring your personal problems in, thinking about what a person wants. I feel that when you——

Senator SPECTER. You didn't think it was important that Mr. Hinckley wanted fame and glory——

Mr. LASSITER. I do not think anybody should try and make a decision, should let that into their mind in reaching a verdict. It would not be a justified verdict, I don't think.

Ms. BROWN. Could I make a statement behind that?

Senator SPECTER. Yes.

Ms. BROWN. It was not my personal feeling that he wanted fame and glory. It was stated in his writings. In a lot of different things that he wrote, this is what he was seeking. Even on that Jodie letter he said this historical deed. It was not my personal feelings. It showed what he was after.

Senator SPECTER. Ladies and gentlemen, we very much appreciate your coming today to give us this information. We would appreciate it if you would communicate with us if you have any further thoughts on the subject, as you mull over your experiences, to tell us what ideas or suggestions you would have on the questions which we have discussed today. This subcommittee will be considering it for some time. We would be very receptive to having any more information from you on these subjects.

Thank you very much.

We will now call Dr. Richard Ratner and Dr. Allan Beigel please.

Senator HEFLIN. Mr. Chairman, are there written statements?

Senator SPECTER. Senator Heflin, there is no written statement by either which I have received. Do either of you gentlemen have a written statement? We are not saying you should on this short notice.

Dr. BEIGEL. Mr. Chairman, I did make available to your staff a statement by the American Psychiatric Association released on

June 22 on issues arising from the *Hinckley* trial, which we would appreciate being made part of the record.

Senator **Specter**. Without objection, we shall be glad to.

Dr. **Ratner**. I had a brief written statement, Mr. Chairman, that I thought brief enough that I could read before taking any questions.

Senator **Specter**. Fine, Dr. Ratner, we will start with you. Would you state your full name for the record and give us your educational and professional background please?

STATEMENT OF RICHARD A. RATNER, M.D., WASHINGTON, D.C.

Dr. **Ratner**. Mr. Chairman, my name is Richard A. Ratner. I have been a private practitioner of psychiatry in the District for the last 10 years. For a majority of that time, I have been a consultant to the forensic programs division in St. Elizabeths Hospital.

I got my undergraduate education at the University of Chicago. I took my medical training in your hometown, Mr. Chairman, at the University of Pennsylvania School of Medicine. I did my psychiatric residency at the Albert Einstein College of Medicine in New York and then spent 2 years in the U.S. Army serving in Vietnam and at Fort Belvoir, finishing with the rank of major in the Medical Corps.

Senator **Specter**. Dr. Ratner, you are a consultant at St. Elizabeths Hospital and have been since 1972?

Dr. **Ratner**. That is correct.

Senator **Specter**. We would like to explore with you the procedures which will be used there as to Mr. Hinckley. Do you have an opening statement?

Dr. **Ratner**. Yes.

I wish to beg the committee in the strongest terms not to allow itself to be unduly influenced by the wave of public reaction, most of it negative, to the acquittal by reason of insanity of Mr. Hinckley earlier this week. Having lost a contest or a game in other fields of endeavor, we do not usually clamor for a change in the rules that would guarantee winning in the future. While I do not mean by such a comparison to trivialize the issue, I do want to say that this week's verdict does not necessarily, in my opinion, invalidate either the insanity defense or the major criteria for it in use.

We have been hearing outraged denunciations of the law, the jury, psychiatrists, and psychiatry from many who are searching for scapegoats now that the jury has made the so-called wrong decision. We have to take account of what to me appears to be a kind of a lynch mob atmosphere these days as the committee goes about its work.

I am not here as a staunch defender of the laws regarding insanity as they are, especially on the Federal level. Indeed, there is no one set of laws but different ones in different jurisdictions.

As has been stated here before, had Mr. Hinckley been tried in local courts, the burden of proof would have been on the defense. It would have been an affirmative defense of insanity. But I wish to remind the committee that in its various forms the insanity defense has been with us for centuries. Its durability and its longevity are reflections both of its usefulness and its importance to society. It is not important because of the number of individuals who successfully avail themselves of it. In the District of Columbia last year, I am told, there were 19 successful insanity defenses as against more than 1,000 cases in which it was considered. Of these 19—and this is a fact that I think is rarely brought out—the majority by far were not contested by the Government. These were insanity defenses that succeeded because the Government and the defense agreed, the Government stipulated.

It is important, though, because it expresses the sense of the community that there needs to be an escape hatch, to use the words of Alan Stone, former president of the American Psychiatric Association, for those who are so obviously and seriously ill that the community or its representatives cannot bring themselves to punish as they would an ordinary criminal. No modern society lacks such an escape hatch. Despite the shifting definitions and the criteria over the course of our history, neither have we.

Senator SPECTER. Have you finished your prepared statement?

Dr. RATNER. Yes.

Senator SPECTER. We would like to proceed to some questions, specifically about St. Elizabeths, which was really what we had in mind.

I would like to say preliminarily, however, that this subcommittee does not regard the trial of an assault with intent to kill the President as a game. We are not seeking to change any rules to guarantee a victory of the next time around. What we are doing is making an inquiry to see what the law ought to be by way of a definition of conduct and what the legal procedures ought to be by way of burden of proof. This subcommittee is not proceeding in any sense as a lynch mob and shall not do so but will consider this issue analytically and dispassionately and render our recommendations in terms of what we think is in the interest of society, which has an appropriate accommodation for the rights of the individual who may be a defendant in a criminal case.

Having said that, I would appreciate it if you would describe for the subcommittee the procedures followed when an individual is sent to St. Elizabeth's after a verdict of not guilty by reason of insanity.

Dr. RATNER. Yes. Any individual so judged is admitted to the maximum security side of the John Howard Pavilion at St. Elizabeth's Hospital. This is a separate building constructed in 1957 for the express purpose of housing the so-called criminally insane. The maximum security units are reached through a set of electronic doors. There is a metal detector and a guard at the main entry. The exercise area, while outside, has a set of double walls around it. It is generally considered a very secure facility.

Senator SPECTER. Do you recall any instance where an individual was not committed following the 50-day evaluation period?

Dr. RATNER. I believe there was one incident. It happened so many years ago that my memory is vague. But I think it had to do with a jurisdictional issue rather than a feeling that this individual was ready to go.

Senator SPECTER. How many situations are you familiar with where the matter has been raised?

Dr. RATNER. I'm sorry?

Senator SPECTER. How many cases have there been?

Dr. RATNER. Of people being——

Senator SPECTER. People who have been evaluated for commitment following the 50-day evaluation period where they have been acquitted by reason of insanity.

Dr. RATNER. I am not familiar with any who have left after the 50-day——

Senator SPECTER. How many are you familiar with who have stayed after the 50 days?

Dr. RATNER. Hundreds. Everybody, unless there is a specific waiver of the so-called Bolton hearing, is given this opportunity to go back to court.

Senator SPECTER. Is there any average length of time of commitment after acquittal on grounds of insanity?

Dr. RATNER. Yes. The figure that has been given out to the press by the people at St. Elizabeth's is 4½ years. However, this is a figure that includes all individuals who have been found NGI. That includes misdemeanors——

Senator SPECTER. NGI?

Dr. RATNER. I'm sorry. Not guilty by reason of insanity.

That includes misdemeanors, minor crimes of all sorts, and a relatively small number of serious felonies.

Senator SPECTER. Do you have any statistics or, in the absence of statistics, an estimate on the percentage of cases where individuals are released with private counsel as opposed to the absence of private counsel?

Dr. RATNER. I do not have any such figures. However, the great majority of those that deal with us at St. Elizabeth's are indigents and from the lowest socioeconomic strata. In many cases they are defended by the public defender service of District of Columbia.

Senator SPECTER. Would it be possible for you to give us the statistics as to what happens if somebody who has private counsel as opposed to someone represented by the public defender?

Dr. RATNER. I would say the major difference is that the private counsel——

Senator SPECTER. My question is, Can you get us statistics?

Dr. RATNER. Can I get from the hospital for you?

Senator SPECTER. Yes.

Dr. RATNER. I would have to inquire. I do not know if the hospital would keep statistics of that kind.

Senator SPECTER. We would appreciate it if you would. We would be interested to know what difference, if any, exists as to release, amount of time, procedural differences on the issue of private counsel.

Dr. RATNER. With respect to the issue of procedural differences, so far as I know there are none. The statute says that there is a 6-month minimum between reviews of an individual who is at John Howard and that, whether it be private or public counsel, they can bring the subject to the courts after 6 months.

Senator SPECTER. Dr. Ratner, after the initial evaluation, how frequent are the evaluations?

Dr. RATNER. Well, the actual day-to-day treatment evaluations are a continuing process. Individuals in treatment there are in contact with the staff.

Senator **Specter**. When does it come up again as to whether he may be released? After the 50-day evaluation, he could be released then theoretically?

Dr. **Ratner**. He could theoretically be released. After that——

Senator **Specter**. And when is the next time that he could be released?

Dr. **Ratner**. A minimum of 6 months must pass between reviews.

Senator **Specter**. And there could be an application for release 6 months after the 50-day evaluation period?

Dr. **Ratner**. That is correct.

Senator **Specter**. And then a petition 6 months beyond that?

Dr. **Ratner**. Yes. But it is not mandated. That is, if after, let us say, 1½ years an individual and his attorney do not feel that they want to bring such an action, it is not automatic that such an action is brought.

Senator **Specter**. Senator Heflin?

Senator **Heflin**. You know, you brought out a question in which it has been my observation that it is a rare instance that a jury finds a defendant not guilty by reason of insanity. I practiced law and tried a lot of criminal cases, a total of maybe 25 years. I guess I have tried more than 100 homicide cases but largely from a defendant viewpoint, some as a special prosecutor. I think only in one instance did I ever see a jury return a verdict of not guilty by reason of insanity. And in that instance it was largely a situation in which there had been a wife that had been killed and her lover. It was more of a seeking of a legal peg to hang a hat on and not to declare the man guilty.

I think statistic-wise there is this matter of looking back over the history which you brought up.

I really believe that we are headed toward changes in the law. From the testimony of one of the jurors the idea of an alternate, another possibility, whether it be guilty but insane or something. I think we are moving in that direction. I am not sure that the psychiatric community would not agree because there has been a lot of feeling that the disagreement in expert testimony in the field of psychiatry has been magnified because the jury has to reach a yes or a no verdict. In effect, the statement of the American Psychiatry Association brings that out.

I would suggest that people in the medical field of psychiatry review this issue. Maybe without advocating, they can come up with a standard to be used for a guilty but insane determination or some other similar words. I am not exactly in my own mind feeling that the word of guilty but insane is a proper terminology to be used. But I do suggest that this be looked into. It could be a great aid to this committee and to the Senate and to the Congress and to people in the criminal justice field throughout the entire Nation and the world, for that matter.

I realize I am getting a little off the subject of what happens after a person goes to St. Elizabeth's.

Do you have any figures as to the people who have been released and then committed similar crimes after being released, after having been found not guilty by reason of insanity? In other words, the jury verdict was not guilty by reason of insanity. They are then sent to a mental institution. It is determined that they have regained their sanity. Then they go out and commit an offense of some degree of similarity.

Dr. RATNER. I do have some figures on that. It is a big subject because we have to distinguish between people who have been found not guilty by reason of insanity then released and then who go out and commit another crime versus people who are confined simply as being mentally ill who might go out and commit a crime. There has been a great deal of work done on both of those subjects.

The figures that I have from John Howard over what I believe to be a 4-year period suggest that 12 percent of those who are released go on to be apprehended for some infraction. However, most of these infractions are also minor. Things like not showing up for an appointment after you have been placed out on convalescent leave would be counted in that figure. It is my understanding that this figure, even including those minor kinds of infractions, is considerably less than the recidivism rate from prison populations.

Senator HEFLIN. Do you feel that there is a need for some type of standard for psychiatrists who are determining whether a person no longer is suffering from the psychotic condition that was involved in the criminal act and that he poses to be released, I mean some standards as to whether or not in the judgment he is recovered but still has the potential of going back into that mental state again? Society, in my judgment, is looking at this issue very carefully. They do not want Hinckley or a person in a similar situation released, if they think that he poses a threat to the President or threat to any individual or threat to Jodie Foster. There are many, many aspects in the *Hinckley* case in which there are threats that could be doing it.

Do you feel that there could be some type of a standard to direct to psychiatrists as they determine whether or not the person has recovered from his mental illness and whether or not he should be released?

Dr. RATNER. Well, the standard as it is stated these days, the legal standard for release is, of course, that a person not be dangerous to himself or others by virtue of mental illness. If you are asking about whether additional language could be helpful as a guideline for the court or for us, I do not know because in my experience dangerousness is one of those issues where adding a lot more language does not really clarify things very much. We are up against a basic imponderable with individuals because, in order to judge dangerousness, we have to take account not only of individual psychology, not only of the way he has handled himself and behaved in the hospital, but also the interpersonal relationships he is likely to get into, the kinds of stresses he is likely to experience when he gets back out on the street, things that by their very nature are impossible to predict, whether he has a fender-bender out on the parkway and were to become enraged, whether he would or would not carry a weapon. It is one of the most impossible tasks in all of psychiatry. In my personal opinion, the people at St. Elizabeth's who are charged with the responsibility of going to court and saying, "Your Honor, I think this individual is ready for release," have probably the most difficult and painful job in psychiatry. The judges who officiate have among the most painful jobs on the bench.

I would say that it has been conventional wisdom for the last several years based on some early studies that psychiatrists are totally inept at predicting dangerousness. Figures have been interpreted to mean that we are wrong 95 percent of the time. I would like to point out to the committee that there——

Senator SPECTER. Excuse me. You are saying that psychiatrists are inept at predicting dangerousness?

Dr. RATNER. Yes, sir.

Senator SPECTER. You are incorrect 95 percent of the time?

Dr. RATNER. That is the way the studies that have been done in the last 5 to 10 years have been interpreted, especially by civil liberties groups who feel, interestingly, that psychiatrists are——

Senator SPECTER. Are they saying that you have retained people who are not dangerous as opposed to releasing people who are dangerous?

Dr. RATNER. Precisely, precisely. And they feel that we tend to err much more in that direction, that we tend to overpredict.

I was going to say that recent studies—I can give you the reference and the individual—suggest that we are a little better than that, that our prediction rate may be more in the vicinity of 40 or 45 percent, very much tied to the context of the setting. In other words, the more we know about what is likely to go into a situation the better we are able to predict the outcome.

Senator HEFLIN. Would an adversarial hearing be wise or unwise in the determination of the issue of whether a person who has been convicted, I mean who has been found not guilty by reason of insanity and is confined to a mental institution should be released, would some form of an adversarial with which there is an obligation to, in effect, say that this person does pose a threat and to have examination and cross-examination in regard to this? Would this be helpful or hurtful in the protection of society's interest if a person is released and then later commits an act of a similar kind?

Dr. RATNER. Are we talking about in the prerelease phase?

Senator HEFLIN. I am talking about after he has been found by a jury not guilty by reason of insanity, confined to a mental hospital, stays there 3 or 4 years, is off in 50 days or 6 months, whatever it is. But before he would be released that there would be some type of an adversarial hearing in which pro and con is presented and you have some decisionmaker.

Dr. RATNER. Indeed, that is what goes on. That is the way things do work. The hospital has authority to transfer a patient within the hospital grounds, for example, from maximum to minimum security. However, the hospital does not have the authority to make a decision regarding leave, convalescent leave or what we would call a conditional or an unconditional release. That decision can only be made in court, and it is an adversarial procedure to the degree that the government is willing to contest the findings. Indeed, there are occasions when those of us who are working at St. Elizabeth's do not feel an individual ought to be released but, because of the 6-month hearing, the individual's attorney brings the motion. A private psychiatrist will often come in, interview the individual, look over his records, and then be the defense, if you will, witness before the judge, suggesting that the individual should be released, whereas the hospital might feel he should not be. And it is an adversarial procedure.

Senator SPECTER. Thank you very much, Dr. Ratner. We very much appreciate your being here.

Dr. RATNER. Thank you, Senator.

Senator SPECTER. We now would like to turn to Dr. Allan Beigel, who is the Chairman of the American Psychiatric Association Governmental Relations Committee. Dr. Beigel, we would like to start by asking you to outline your educational background and your professional experience please.

STATEMENT OF ALLAN BEIGEL, M.D., CHAIRMAN, GOVERNMENTAL RELATIONS COMMITTEE, AMERICAN PSYCHIATRIC ASSOCIATION

Dr. BEIGEL. Thank you, Mr. Chairman. Let me express on behalf of the American Psychiatric Association our appreciation for the committee's attention to what we consider to be an extremely important issue and, more importantly, for bringing the discussion about this issue into the proper forum, namely where laws are made, whether they be here within the Congress of the United States or within the State legislatures, which are also concerned with this issue.

We perceive our role as psychiatrists and as an association to provide whatever substantive input we can to the deliberations of this body or any other legislative body.

I am a physician, a graduate of the Albert Einstein College of Medicine in New York City, who did his psychiatric training at the Mount Sinai Hospital in New York City and at the National Institute of Mental Health in Rockville, Md. Since 1970 I have been affiliated with the University of Arizona College of Medicine in Tucson, Ariz., where I am currently professor of psychiatry.

I have had considerable involvement over the last number of years in the area of forensic psychiatry as part of my work in Tucson, Ariz. I have testified in many cases both criminal and civil, and have served as a consultant to the Arizona State Legislature on a wide variety of issues relative to civil commitment, competency to stand trial, and the insanity defense. .

Senator SPECTER. Dr. Beigel, do you think that testimony by psychiatric experts should be confined to experimental and statistical facts and findings, excluding theoretical notions, opinions, reflections on the personal experience of the expert?

Dr. BEIGEL. Well, I think that is, again, going back to what I said earlier, that a determination of that is something that would obviously change the role of the expert, whether it be a psychiatrist or any other expert in the courtroom because generally speaking all experts are requested, in addition to presenting their facts——

Senator SPECTER. It will change the role, but should it be done?

Dr. BEIGEL. I think that if in fact the legislative decision is to change the role of experts within the courtroom, then certainly that could be a major change that could be brought about.

Senator SPECTER. Senator Dole has requested these three questions which I would like to go on to ask you.

Would it be helpful to the jury's task if there were instructions from the court that ordinary human emotions such as passion, envy, greed, depression, frustration, anger, rebelliousness, lust, and so forth are not in themselves to be taken as signs of insanity?

Dr. BEIGEL. I do not think that would be helpful because that would tend to limit the boundaries of medical expertise and would remove from the role of the psychiatrist his capacity to deliver himself of a proper diagnostic opinion or a proper diagnostic description.

Senator SPECTER. Senator Dole's next question is this.

Many commentators assert that there is no known and reliable causal relationship between social, familial, educational, and economic background in the presence of a mental disease. Should testimony regarding such factors be prohibited as irrelevant to the determination of insanity?

Dr. BEIGEL. My response to that question, Mr. Chairman, is that for the many that there are who assert that, there are also many who assert that there is a causal connection. Again, I think that would be an inappropriate limitation of a physician's ability to describe the condition which exists.

Senator SPECTER. In the press release which you have made available to us and which, as per your request, has been made a part of the record, your release from 2 days ago, you have these notations: As a general matter, psychiatrists are trained to diagnose and treat mental illness. That is not what they are called on to do in a criminal trial involving the insanity plea.

And somewhat higher on page 2, you say: Psychiatrists are not present in the courtroom to decide the ultimate issue of guilt or innocence.

Do you think it would be useful if the psychiatrists were not permitted to testify, at least on the ultimate question, is the defendant legally insane, but reserving that question for the jury after the psychiatrist has testified to the wide range of other questions?

Dr. BEIGEL. I think the psychiatrist's role in the courtroom is to describe his professional assessment of the clinical condition of the defendant at the time that the offense was committed and to indicate whether that clincial definition falls within the bounds of the definition of insanity, whatever that definition is. It is then the jury's determination as to whether or not that definition either makes the person guilty or innocent.

Senator SPECTER. My question to you is, do you think that the psychiatrist should be permitted to answer the question and that the lawyer should be permitted to put the question: do you in your professional opinion think the defendant is legally insane?

Dr. BEIGEL. Again, that goes back to the comment that I made in response in Senator Dole's first question, which is that, if there is a determination that the role and nature of the expert witness in the courtroom is to be changed as part of whatever amendments there are made in this particular process or in any other process within the criminal law, then certainly that is a way in which Congress could determine that such a change could occur. As to whether that change would be more or less helpful to a jury or to citizens at large in terms of determining guilt or innocence is a question that

I think would have to be directed to those people who will be making that decision.

Senator SPECTER. I take it from my question as I understood it from the question posed by Senator Dole that you want to leave that to us?

Dr. BEIGEL. That is correct.

Senator SPECTER. Thank you. Senator Heflin?

Senator HEFLIN. The whole field of expert testimony has largely developed as an exception to the invasion of the right of the jury to make determinations because of some expertise in the witness himself. In a malpractice case generally I ask the question of whether or not it was or was not malpractice or in keeping with the standards. The whole field of expert testimony, I think, supposedly has been very helpful particularly since we have an adversarial system. I mean, you have got people expressing opinions. They have to substantiate their opinions with the evaluations that they are given.

I think a jury would be left in more of a quandary, in my own personal opinion, if they did not have the right to hear from people with expertise as to their opinion, particularly in regard to when the experts may differ.

I read the statement of the American Psychiatric Association on the issues. Basically, you are, in effect, in a defensive posture, explaining the difficulties that psychiatrists face in the legal system. I think there is no question that the statements are generally correct in this regard.

I am interested in two or three of the matters that are brought here. No. 7 which you have, is the disagreement in expert testimony is magnified in an insanity case because the jury reaches a yes or a no verdict. The unitary quality of the decision does not allow for the harmonizing of reasonable professional agreements as would often occur in a noncriminal trial setting. Also, as indicated, the basic issue in an insanity case depends on the moral judgment regarding criminal responsibility. Since disagreements in medical conclusions may have an impact on these important moral decisions, it is often made to seem as if the psychiatrists are responsible for the moral judgments themselves rather than the presentation of medical testimony. This is an unfortunate perception which removes responsibility for the jury decision from the jury and erroneously places it on experts.

That gets into some of this expert witness subject. But it also gets into the issue of yes or no as to whether or not there ought to be stages or classifications of criminal responsibility in relationship to the types of mental illness that could affect criminal responsibility.

Already in a number of States we have the guilty but insane issue that has been adopted. There is a movement moving now in that regard.

Are there classifications that you think would be better than just the guilty versus not guilty by reason of insanity? If so, what type of classifications do you have in mind or would recommend?

Dr. BEIGEL. In response to your question, Senator, let me take the opportunity to share a couple of things that I think are important to be considered when this issue is given the full hearing that it is being given here today.

First of all, it is clearly the public perception that one of the things that happens in trials of this kind is that there is a battle of experts with experts disagreeing, which is viewed as being a discredit to the profession. I think there are reasons that this occurs that have nothing to do with the credit or discredit of the profession. One that you have called attention to is the fact that the extent of agreement that people may have about a professional and scientific issue can change if the ground rules under which that agreement is being presented or that disagreement is being presented tend to move people in a direction that requires them to respond differently, the so-called yes or no.

The other thing that I think is important to keep in mind is that one of the consequences of the adversarial process is that both defense and prosecution, in order to prove their case, seek experts that reflect what they are attempting to prove. If in fact the defense and the prosecution each put on the witness stand three people who support their position, this by no means indicates that among a larger or broader professional community there would be a 50-50 agreement or disagreement about the professional question being raised.

I do not know what 100 psychiatrists who would have examined John Hinckley would have said with regard to his diagnosis. But at least 1 cannot assume that because 6 psychiatrists disagreed 3 and 3 and to the extent that disagreement was heightened by the process itself, that 100 would have disagreed 50-50. And I think that is important to keep in mind because it goes to the heart of the issue relative to some of the influences of the adversarial process on the role of expert testimony.

Therefore, moving to your question then about finding different levels and what can be done, clearly the whole concept of guilty but mentally ill is part of the search for a different level, a different approach, or a different plea. Clearly, it is one that should be seriously considered because it is already been seriously considered by many jurisdictions and adopted by some of those jurisdictions.

I think there are, however, two points to keep in mind when considering that question.

One is that in those jurisdictions in which the guilty but mentally ill plea has been adopted, there has been noted to be a sharp increase in so-called insanity pleas. There is literature which supports the conclusion that the reason for that increase is to effect a plea bargaining process with the dropping of the not guilty by reason of insanity defense in return for the acceptance of a plea bargain which is guilty but insane.

Second, every State jurisdiction now has a capacity other than guilty but insane, to insure the outcome of what is allegedly the purpose of the guilty but insane verdict, namely treatment for those people who are found guilty and who are mentally ill. Every State in the United States has a prison transfer law. The U.S. Supreme Court has adjudicated the validity of that. That law, in effect, allows an individual who is convicted of a crime to receive appropriate treatment, in other words to be guilty but mentally ill and get the care that they require.

I think those issues need to be kept in mind in terms of considering this alternative. That is not to suggest that this alternative ought to be excluded, but it needs to be examined carefully.

What the expert testifies to is not whether a person is not guilty by reason of insanity or guilty but mentally ill. What the expert testifies to is the clinical condition of the person in the light of the standard that that particular State or jurisdiction has set. What will not change insofar as the expert's testimony is the description of the clinical condition. What may change, depending on how Congress and the State jurisdictions change the standard, is what the conclusion may be, either the conclusion delivered by the expert or that reached by the jury relative to how that clinical description does or does not meet the test that exists within that particular jurisdiction.

So, from our point of view it is an absolutely legitimate societal question as to whether the test should be changed. That is not necessarily going to change what we, as scientific evaluators, tell the court with regard to the clinical status of the individual being examined.

Senator HEFLIN. You raised the issue of plea bargaining. That can be an issue. It can be the escape valve for a lot of people that are guilty seeking some type of relief. It can be used by prosecutors.

Assuming that we can eliminate the problem of entering guilty pleas under that category but that this be only a category in regard to juries, in other words you cannot plead, you are either going to have to plead nolo contendere or you are going to plead guilty or not guilty, those pleas, assuming you limit it to that. Seldom today do you find anybody ever entering a plea of—I mean, in the plea bargaining course to send somebody to a hospital. But, assuming that we eliminate the problem by legislative drafting of the plea bargaining, now we are confronted as to whether or not there ought to be levels or classifications. If there are levels or classifications, what standards would be used? Obviously, you cannot use the same standard.

So, it becomes a task of trying to fashion categories and standards that would affect that category. The clinical condition of the accused will stay the same, as you brought out. But will their societal needs, in effect, be better met by having classifications and standards that are applicable to the different classifications?

Dr. BEIGEL. There is no question about that, Senator. In my own State, for example, we have what is considered to be within the common law the most narrow standard that currently exists, namely *M'Naghten*. In the Federal U.S. jurisdiction, as well as in many other States the standard is one that would be termed by most to be more liberal or less conservative.

Clearly, it is within the capacity of any jurisdiction to determine that the standard can be made more or less strict. Certainly, it is at least my reading of the Federal standard that there is a capacity to make it more strict, in other words, it is not the strictest standard that exists, without, eliminating the insanity defense altogether.

I might point out that in all those States that have guilty but mentally ill, except for the State of Idaho, they have retained an insanity standard. They may have changed the insanity standard when they introduced guilty but mentally ill, but they did not abolish the insanity standard. The only State which has moved to abolish the insanity standard is the State of Idaho. I think there is general agreement among all people, including those in Idaho, that whether or not that was constitutionally appropriate still is to be determined.

Senator **Heflin**. Assuming that you have two classifications—I am not sure that maybe you ought not to have more than two; but, anyway, assuming two. Assuming you had the not guilty by reason of insanity, then you had the guilty but mentally ill, would the fact that you would have that additional standard mean that you ought to have a more strict standard on the not guilty by reason of insanity? For example, should the *M'Naghten* rule, in effect, which is right or wrong and now irresistible impulse, be the standard for not guilty by reason of insanity and then to have a lesser standard of the guilty but insane?

Dr. **Beigel**. As a psychiatrist, I think I am being asked to render both a psychiatric and a political judgment. I will make my best effort. It is my understanding, based on what has occurred in those States which have adopted a guilty but mentally ill, that this was exactly the purpose. The purpose was that, by creating a so-called guilty but mentally ill standard, they could then in turn change to a more narrow direction in the insanity defense standard. So, in turn, fewer people would "get off," and more people who had mental illness would be found guilty and yet still get the treatment that they require.

So, the guilty but mentally ill then became the means by which the insanity defense could be tightened.

What I simply was raising in my comment earlier was that I do not necessarily think you need to do one in order to do the other. You can change the insanity defense standard without introducing guilty but mentally ill as an additional plea. That is, obviously, in the end a legislative determination. Or you can do both.

Senator **Heflin**. The words not guilty in this *Hinckley* case, in my judgment, are the basic cause of the public indignation that has risen. They associate that not guilty as having a meaning that they do not desire. The word guilt in the mind of the defendant has certain stigma. Are there other words that could be used which might accomplish generally the same purpose from societal needs and for the protection of reputation of defendants or whatever else you might call it? If so, what words come to your mind?

Dr. **Beigel**. Well, there are other words, and I am not the one who is suggesting them. But one other phrase that comes to mind that has been suggested by some is "guilty but not responsible."

Let me, however, make a further comment in regard to your observation, Senator. With regard to the public perception, I think we also need to keep in mind—and this is, of course, my personal opinion—that one of the things that governs the public's concerns about, "not guilty by reason of insanity" is the idea of freedom soon to follow, that this person will, in effect, be out. That, of course, then makes two further concerns.

One is that they are not being punished for what they did. Two, if they are dangerous or could be dangerous again, what does that mean for the community and the safety of the community at large?

I raise that because I do not know that changing, the term "not guilty by reason of insanity," is going to be the total solution to what is really the public's concern, which at least I think, in addition to the declaration of not guilty, again speaking personally, has to do with those two other factors that I have mentioned and perhaps others that I have not thought of.

Senator **Heflin**. Well, I do not think really we are going to find a perfect system.

Dr. **Beigel**. I agree.

Senator **Heflin**. I think that we are looking at the situation for a better understanding of the judicial system and of the field of psychiatry and the issue of insanity and its relationship to the criminal act. I do not think you ever find a system that is perfect. The justice system is not perfect. Psychiatry, obviously, is not perfect. And you have got different feelings.

So, it is a sort of a groping to find a better terminology, a better handling of the matter, a better perception of the field of psychiatry and its relationship to the criminal justice system and a better perception for the people to have pertaining to the issue of guilt or not guilt where insanity is involved.

Dr. **Beigel**. And we could not be more interested and share very much with you that same common goal and the idea of contributing our expertise in that area.

You raised earlier, Senator, the whole question of what happens to the person in the aftermath. Of course, one of the other areas of concern that we have that was alluded to by Dr. Ratner and by Senator Specter has to do with what happens to that person who is found not guilty by reason of insanity and what is the standard that is then used to determine whether that person shall be released and what is the procedure that is used to determine when and if that person shall be released. There, while psychiatrists play a role in describing the clinical condition in the same way that they play a role during the determination of guilt or innocence, we get into other problems, namely the fact that our courts are or at least have been extremely divided as to what differences one can use or mandate as to how a person who is found not guilty by reason of insanity is treated within the court system after they have been found not guilty by reason of insanity in comparison to someone who goes through that process but without having committed a crime.

There are some court decisions which have said, yes, you can treat these people differently, but there are limits as to how differently you can treat them. And there have been other decisions that have said you cannot treat them differently at all.

So, one of the dilemmas that we all face in this regard, both you as lawmakers and we as psychiatrists, is that we have this particular problem as well.

So, I thought I would just mention that.

Senator SPECTER. Thank you very much, Doctor. We very much appreciate your coming.

Dr BEIGEL. Thank you, sir.

[The article from American Psychiatric Association follows:]

American
Psychiatric
Association

FOR IMMEDIATE RELEASE
June 22, 1982
Contact: John Blamphin 797-4950
Joel Klein 775-0184

1700 18th Street, N.W. Washington, D.C. 20009 Telephone (202) 797-4950

NEWS

STATEMENT BY THE AMERICAN PSYCHIATRIC ASSOCIATION ON ISSUES ARISING FROM THE HINCKLEY TRIAL

(In response to inquiries from the public and the news media, the American Psychiatric Association issues the following statement concerning questions raised by the Hinckley trial. These important public issues will be debated and discussed over the course of the next few months. The Association plans to play an active role in these discussions.)

1. Long before there were psychiatrists, there was an insanity defense. The defense has always been at the heart of individual responsibility in the criminal justice system. Fundamentally, it calls for a moral judgment made by a jury.

2. Whether there should be an insanity defense and what particular standards should be used are issues that the APA believes are for society to decide. Psychiatists disagree on these matters, much as other citizens do.

3. Questions regarding the appropriate legal tests of insanity in a criminal trial as well as who should bear the burden of proof on this issue--defense or prosecution-- are matters about which the APA is deeply concerned. Any insanity test should recognize the extent to which psychiatric knowledge can meaningfully contribute to a realistic understanding of a person's mental status and behavior at the time he commits a criminal act. Moreover, consideration of the issue of "proof beyond a reasonable doubt" as a standard in insanity cases should reflect the fact that, much as in the case with medical knowledge generally, psychiatric knowledge on these matters cannot be expected to meet demands for absolute certainty.

4. Whatever the status of the insanity defense, psychiatrists will inevitably be asked to testify on this issue in criminal trials. Although called by one party or the other, psychiatrists are not present in the courtroom to decide the ultimate issue of guilt or innocence, but rather to provide expert testimony to assist the jury in making that determination. The final moral decision--guilty or not guilty-- always has and always will remain a jury decision irrespective of the insanity defense.

5. The fact that psychiatrists may disagree in their testimony concerning the insanity defense is neither novel nor surprising. Experts often disagree in criminal and

civil trials. For example, other medical experts may disagree on the interpretation of X-Rays, engineers on structural issues, and economists on market concentration issues. While such disagreement is always disquieting, it often reflects the fact that scientific and professional judgment have not reached closure. But that does not mean that the scientific presentations-- such as psychiatric testimony in an insanity case-- are not relevant or helpful to juries seeking to resolve difficult issues.

6. The scientific disagreements in an insanity case are, in our view, the result of several factors. As a general matter, psychiatrists are trained to diagnose and treat mental illness. That is not what they are called on to do in a criminal trial involving the insanity plea. Instead, after a criminal act occurs, psychiatrists are then asked to give an opinion about a person's state of mind and its effects on his behavior at the time the act occurred. While psychiatric training is valuable in addressing this question, and psychiatric diagnosis has achieved a much higher level of reliability than is publicly recognized, it is hardly surprising that there are disagreements when such a retrospective inquiry is made. These disagreements are often fueled by the adversary system which allows prosecutors and defense lawyers to seek expert witnesses that may be deemed sympathetic to their views.

7. The disagreements in expert testimony are magnified in an insanity case because the jury reaches a "yes" or "no" verdict. The unitary quality of the decision does not allow for the harmonizing of reasonable professional agreements as would often occur in a non-criminal trial setting. Also, as indicated, the basic issue in an insanity case depends on the moral judgment regarding criminal responsibility. Since disagreements in medical conclusions may have an impact on these important moral decisions, it is often made to seem as if the psychiatrists are responsible for the moral judgements themselves, rather than for the presentation of medical testimony. That is an unfortunate perception, which removes responsibility for the jury decision from the jury and erroneously places it on the experts.

Senator **Specter**. While the hearing was in session, we received a letter from Judge Parker. As I had said at the opening, we had discussed the possibility of Judge Parker's appearance, and he had expressed an interest, as he has noted in his letter. But upon further reflection he has decided that it would be inappropriate for him to appear as a witness because of his continuing responsibility with Mr. Hinckley's case.

He secondly points out that there is a judicial conference of the United States which has a standing committee on the administration of criminal law. We shall contact that standing committee and perhaps that committee can offer testimony. Perhaps Judge Parker could as an adjunct to that committee's testimony.

The judge has requested that his letter be made a part of the hearing record, which I think is most appropriate. So, I will at this time, unless there is objection, make a part of the record my letter to Judge Parker dated June 23, a part of the record together with his response dated June 24, 1982.

With that, the hearing is concluded.

[Whereupon, at 1:55 p.m., the subcommittee was adjourned.]

[Material referred to follows:]

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate
WASHINGTON, D.C. 20510

June 23, 1982

The Honorable Barrington D. Parker
United States District Judge
United States Courthouse
Washington, D. C. 20001

Dear Judge Parker:

At the request of Senator Mathias, Chairman of the Criminal Law Subcommittee, and with the concurrence of Senator Thurmond, Chairman of the Judiciary Committee, I will chair hearings on the insanity defense and the several proposals pending in the Senate to modify presently applicable case law. The first hearing will convene at 9:30 a.m. on Thursday, June 24, 1982, in Room 4232, Dirksen Senate Office Building, 1st and C Streets, N. E., Washington, D. C. You are hereby invited to appear as the first witness.

The Subcommittee would be interested in your comments as an experienced trial judge who just presided over a historic case involving the insanity defense. The *Hinckley* case seemed to raise once again all of the issues which have so long been debated without resolution and without action by the Congress. Hopefully, the merits of the possible reforms reflected in the pending bills can be determined in light of judicial experience in the *Hinckley* case as well as earlier cases. You are uniquely prepared to offer observations on the implications of this case.

Among the specific issues for comment would be whether the *Brawner* test is too vague or too broad, whether jurors can understand and resolve conflicting testimony from psychiatrists, whether jurors can understand and apply the standard instructions as intended by the law, whether the prosecution or the defense should bear the burden of proof and what the standard of proof should be. The hearings should be illuminated by the experience of various participants in the *Hinckley* trial, but will not delve into any aspects of the trial which are not appropriate.

Invitations to appear are also being extended to the attorneys for the prosecution and defense, selected expert witnesses and jurors. Academics and others may be invited at a later date.

Thank you for your consideration of this matter.

Sincerely,

Arlen Specter

AS/prm

United States District Court
for the District of Columbia
Washington, D. C. 20001

Chambers of
Barrington D. Parker
United States District Judge

June 24, 1982

The Honorable Arlen Specter
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I acknowledge your letter of June 23, 1982, inviting me to appear as a lead-off witness at today's hearing of the Criminal Law Subcommittee of the Senate Judiciary Committee dealing with the insanity defense. The recent jury verdict in *United States v. John Hinckley, Jr.*, has indeed generated considerable public interest in the matter and has prompted legislative proposals to modify the law. The verdict has raised issues which have been long debated but which have not yet been satisfactorily resolved.

The specific issues which you list as the subject of concern to the Subcommittee certainly suggest an appreciation and an awareness of the problem. And hopefully, the hue and cry will lead to the adoption of some well-considered and constructive changes in the law.

As the trial judge in the *Hinckley* case and having been involved in that proceeding since the return of the indictment in August 1981, I do have some thoughts about the insanity defense. In my conversation yesterday with Mr. Paul Michel of your Office I expressed an interest in the Subcommittee hearing.

Upon further reflection, there are several reasons why I consider that my appearance would be inappropriate. Even though the jury verdict has terminated the trial, I still have a continuing responsibility for the case by virtue of 24 D.C. Code §301 (1981). Secondly, the Judicial Conference of the United States has a standing committee on the Administration of the Criminal law. It is my belief that the views of that committee, rather than those of an individual judge, should first be made known to the Subcommittee.

Because of the above, I am compelled to decline your kind invitation to appear before today's hearing. I request that this letter be made a part of the hearing record.

Very truly yours,

Barrington D. Parker

Barrington D. Parker

LIMITING THE INSANITY DEFENSE

WEDNESDAY, JUNE 30, 1982

U.S. Senate,
Subcommittee on Criminal Law,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 4232, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Present: Senator Heflin.

Staff present: Jonathan Levin, counsel; and Mary Louise Westmoreland, counsel.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Specter. Good morning, ladies and gentlemen. We will begin these hearings. This is the second in a series of hearings to consider what, if anything, should be done by the Congress and the Senate on the subject of the insanity defense in criminal cases, which, of course, has grown out of the experience in the case of the *United States* v. *John Hinckley.*

Today, we are going to be hearing from a group of psychiatrists, some of whom participated in the *Hinckley* case, and others who did not. We will be examining a variety of questions today to make a determination to the extent we can whether the current legal test of insanity makes sense in psychiatric terms and in legal terms, and whether it is susceptible to be understood by lay jurors.

During the course of the *Hinckley* trial, there were a variety of psychiatric terms used, such as process schizophrenia, major effective disorders, pseudo-neurotic schizophrenia, pathological ambivalence, paradoxical rage, paranoid personality disorder, borderline personality disorder, to mention just a few which we will seek to analyze in terms of what is their meaning from a psychiatric, legal and practical point of view.

We face at the present time a curious legal standard, judging from the *Hinckley* case, where there has been a requirement set forth that the prosecution has to prove that a defendant is sane beyond a reasonable doubt. While there are no precise mathematical standards in the law for what is proof beyond a reasonable doubt, it is certainly more than a 51–49 standard, which is the standard applicable in proof by a preponderance of the evidence, which is the customary standard for detaining someone in a civil commitment context.

So, if you have the standard that someone is more likely sane than not—say, a 51-percent standard—that person is subject to being released from a civil commitment. If you have, say, a 70-percent standard, just to apply a hypothetical standard to proof beyond a reasonable doubt, where the prosecution has to prove the 70 percent standard of sanity, you have the gap between 51 and 70 where it is no man's land. A person may not be sane beyond a reasonable doubt in order to be legally responsible for acts of violence which would constitute crimes, and yet more than 51 percent likely to be sane, which would qualify him for release from detention from a psychiatric institution. That kind of a standard obviously does not make any sense.

The psychiatrists who are present today are Dr. James Cavanaugh, who is the clinical director of the department of psychiatry, Rush-Presbyterian Medical Center, who was a Government expert in the *Hinckley* trial; Dr. Jonas Rappeport, chief medical officer, Supreme Bench of Maryland, a Government expert in the *Hinckley* case; and Dr. Ernst Prelinger, clincial professor of psychology and psychiatry, Yale University, who was a defense expert in the Hinckley trial.

Gentlemen, I would like to begin with the standard used in the *Hinckley* trial on defining legal sanity and legal insanity, with a view to asking your expert opinions as to what it means from a psychiatrist's point of view.

I would like to begin to break this definition down three ways: Its legal meaning, its psychiatric meaning, and its practical meaning; or, point three, to what extent it is subject to being understood in a practical sense. This is the standard that Judge Parker charged on in the *Hinckley* trial:

> The law provides that a jury shall bring in a verdict of not guilty by reason of insanity if, at the time of the criminal conduct, the defendant, as a result of mental disease or defect, either lacks substantial capacity to conform his conduct to the requirements of the law, or lacks substantial capacity to appreciate the wrongfulness of his conduct.

Dr. Cavanaugh, may we begin with you? What does that mean to a psychiatrist?

STATEMENT OF A PANEL CONSISTING OF JAMES L. CAVANAUGH, JR., CLINICAL DIRECTOR, SECTION ON PSYCHIATRY AND THE LAW, DEPARTMENT OF PSYCHIATRY, RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER; JONAS R. RAPPEPORT, CHIEF MEDICAL OFFICER, SUPREME BENCH OF MARYLAND; AND ERNST PRELINGER, CLINICAL PROFESSOR OF PSYCHOLOGY AND PSYCHIATRY, YALE UNIVERSITY

Dr. **Cavanaugh**. Senator, I am prepared to be as cooperative as I can in the hearing this morning. I did come with a prepared statement that I would appreciate the opportunity to read.

Senator **Specter**. Dr. Cavanaugh, that is fine. Why do you not proceed with your prepared statement, if you could summarize it to the extent possible, leaving the maximum amount of time for questions and interchange?

Dr. **Cavanaugh**. Yes, sir, thank you very much.

It is an honor and pleasure for me to appear before this distinguished subcommittee. I am James Cavanaugh and I serve as director of the section on psychiatry and the law, department of psychiatry, Rush-Presbyterian-St. Luke's Medical Center in Chicago. I am an associate professor of psychiatry at the Rush Medical College. The views I express, however, are solely my own and do not represent official institutional policy.

In the interest of brevity, rather than presenting several opinions about the current insanity defense process in our legal system, I will stress a single issue—the disposition and treatment of the mentally disordered offender.

I would respectfully urge this subcommittee to pay as much attention to the problems of the management of individuals after an adjudication of not guilty by reason of insanity as will be given to the problems of the insanity plea itself. In a very real sense, psychiatry perhaps has a more constructive role to play in the posttrial process—a role most consistent with the historic and ethical traditions of medicine to treat the ill and dysfunctional irrespective of their legal status.

I will briefly present several theoretical issues on disposition, followed by one example of an innovative, court-supervised outpatient treatment program for mentally disordered offenders, most of whom were found not guilty by reason of insanity, currently operating in Cook County.

The present system relating to the disposition of an individual found not guilty by reason of insanity has serious deficiencies which periodically result in these mentally disordered offenders becoming lost to followup, sometimes eventuating in spectacular criminal recidivism.

At least four areas can be identified in the disposition and treatment process. One, the NGRI individual—that is, the not guilty by reason of insanity individual—must meet the traditional commitment standards to remain hospitalized. Two, the court is limited either to civil commitment or discharge to the community after an NGRI finding.

Three, in most States there is no option for court-imposed outpatient treatment. Four, there are no provisions for judicial review of the discharge decision in the majority of States. Finally, the Federal system, outside of the District of Columbia, has essentially no organized disposition (treatment) system for NGRI individuals and must rely on cooperative relationships, which are usually missing, with separate State systems.

Appendix I to this testimony is a recent law review article written by my colleague, Attorney Barbara Weiner,[1] which proposes model legislation for proceedings after a finding of not guilty by reason of insanity.

To deal with present problems in the system, it is proposed that, one, jurisdiction is continued after the NGRI finding by the criminal court; two, a broader civil commitment standard is proposed than is presently found in current statutes and which would not require a finding of imminent dangerousness; three, the concept of conditional release from hospital be returned with the addition of judicial powers to require outpatient psychiatric treatment; and, four, judicial review of all discharge planning would be provided.

This model legislation, aimed at the State and county courts where the vast majority of NGRI pleadings occur, dictates a strengthening of judicial involvement in the institutional and post-institutional care of the NGRI individual so as to more reasonably balance the treatment needs of mentally disordered offenders with the needs of the public for safety.

---

[1] See Barbara Weiner submitted material, p. 331.

Court-mandated and supervised long-term outpatient psychiatric treatment is a major feature of this model legislation. Due process and equal protection concerns underlie the traditional hesitancy to move in the innovative manner suggested in the proposed model. At the crux of the problem, a broadened civil commitment standard would have to be applied to the NGRI individual.

The Supreme Court of Alaska in the recent case of *Alaska* v. *Alto* took a bold step in this direction when it stated:

> The acquittee by reason of insanity has, by his affirmative defense, admitted that he was insane at the time of the act in question and he has presented evidentiary support for his admission. Such an admission distinguishes the acquittee by reason of insanity from one whose involuntary commitment is civilly sought and has consistently maintained that he is not mentally ill. Moreover, the acquittee by reason of insanity has committed a criminal act. He therefore differs from the civil committee who is confined because of his potential to commit dangerous acts, not because he has committed them.

In 1979, the Illinois——

Senator SPECTER. May I interrupt you at that point, Dr. Cavanaugh?

Dr. CAVANAUGH. Yes, sir.

Senator SPECTER. You say a broadened civil commitment standard?

Dr. CAVANAUGH. Yes, sir.

Senator SPECTER. That is what you have just defined?

Dr. CAVANAUGH. That is what is suggested in this proposed model legislation, moving, for example, beyond the strict present criteria in most civil commitment standards that the individual must essentially demonstrate present dangerousness.

Senator SPECTER. So, you would seek by that broadened standard to be able to detain people longer who had been found not guilty by reason of insanity because they had committed a violent act?

Dr. CAVANAUGH. That is one possibility, but more importantly this would also be the legislative basis by which to allow the courts to keep a hold on a person found not guilty by reason of insanity even after they are discharged from an institution into the community, because in my experience it is after the person at some point gets out of an institution that they, in most States today, are essentially at some point free to do whatever they would like in the community. And if they have a mental illness and it is not being treated, upon its worsening they could criminally recidivate.

Senator SPECTER. Well, now, you are talking about some expanded outpatient psychiatric treatment.

Dr. CAVANAUGH. That is one feature of the proposed model legislation, yes, sir.

Senator SPECTER. Well, are you suggesting some restraints once they are at large in the community?

Dr. CAVANAUGH. Excuse me, sir?

Senator SPECTER. Are you suggesting some restraints?

Dr. CAVANAUGH. I am suggesting that the criminal court continue to have a hold over and responsibility for supervising what happens to an NGRI acquittee even after they get out of the institutional setting.

Senator SPECTER. Thank you. You may proceed.

Dr. CAVANAUGH. In 1979, the Illinois General Assembly passed legislation containing several features of this proposed model. Maryland and Oregon have had similar statutes for some time. A mandatory outpatient psychiatric treatment program for NGRI individuals supervised by the criminal courts of Cook County will serve as a brief example of the practical implementation of such model legislation.

As medical director of a forensic diagnostic and treatment center, I have had the opportunity to work with a skilled staff in delivering effective psychiatric treatment to court-ordered NGRI outpatients. This program, which is primarily funded by the Illinois Department of Mental Health and Developmental Disabilities, is described in detail in appendix II.

Seventy-five percent of our 60 current patients carry a diagnosis of schizophrenic illness, and a majority were arrested on a major felony charge, usually murder. About two-thirds of these patients have been adjudicated not guilty by reason of insanity and, after a variable period of institutional treatment, were court ordered to a 3- to 5-year period of outpatient care at the center.

After 4 years of operation, no criminal recidivism has occurred, though approximately 25 percent of the treatment population has had to be rehospitalized, usually only for brief periods, because of worsening of an illness state.

The criminal courts have imposed legal sanctions against individuals not complying with all aspects of the treatment program; for example, not taking medications and not appearing for scheduled appointments. And successful operation of the center has required coordination and communication between the criminal courts, States attorneys, public defenders, and officials of the State mental health department.

Several of these NGRI individuals have returned to gainful employment and to generally productive lives in society. Costs of psychiatric outpatient treatment to the taxpayer of $4,000 a year have replaced institutional costs in excess of $40,000 a year.

Certainly, not all NGRI individuals should be managed on a noninstitutional basis, but many eventually can if careful dispositional planning, supported by the above suggested model legislation, is adopted. As always, careful clinical judgment combined with active cooperation from the various agencies and bodies noted above is essential to the success of such ambulatory treatment programs. Modern psychiatric treatment, emphasizing often long-term administration of psychoactive medication and various forms of psychotherapy, can be provided effectively in such settings.

The above is not intended to be interpreted as a forceful endorsement of the current insanity defense standards in this country. Certainly, many changes or modifications are necessary. My purpose has been to highlight the role of the psychiatrist in the evaluation and management of certain categories of mentally disordered offenders.

Also, it is my opinion that the public outcry against the current insanity standards is as much fueled by the phenomenon of criminal recidivism of individuals previously found not guilty by reason of insanity as it is by the exculpation of notorious "celebrities" successfully pleading insanity. After all, out of thousands of felony indictments in this country annually, probably no more than 300, perhaps a maximum of 400 individuals, are exculpated yearly by virtue of insanity.

Perhaps to some citizens, one successful pleading is an outrage. Certainly, the phenomenon of the recidivating NGRI individual is beyond outrage. The public debate will go on. Irrespective of the eventual outcome, I strongly suggest that American psychiatry focus its primary attention on the evaluation and treatment issues contained within the mentally disorder offender controversy. The disposition phase of the insanity defense process is where important medical/psychiatric skills can best be applied. Thank you very much.

Senator SPECTER. Dr. Cavanaugh, you have referred a number of times to the recidivist problem; at one point, you said the "spectacular criminal recidivist." What statistical or evidenciary base do you have for the assertion of recidivism for those found not guilty by reason of insanity?

Dr. CAVANAUGH. I am not fully aware of the actual statistics. In each major community in this country, from time to time case examples arise where an individual who has been found not guilty by reason of insanity commits another major crime. Certainly, in the larger metropolitan areas, this is a more common phenomenon.

It is not an extraordinarily common phenomenon, thank goodness, but it does occur.

Senator SPECTER. Are you saying that you know of no statistical base for the assertion; that is, how many found not guilty by reason of insanity have been charged again with acts of criminal violence?

Dr. CAVANAUGH. Not an absolute statistical base. I would be happy to provide you with it if I could find it.

Senator SPECTER. Well, do you have any base?

Dr. CAVANAUGH. I have an approximate figure, which would be of all individuals found not guilty by reason of insanity, probably less than 5 percent reengage in what might be considered major crimes.

Senator SPECTER. What is your basis for that approximation?

Dr. CAVANAUGH. My basis would be general experience in this field and the few research reports that have been produced by scientists and clinicians involved in this area.

Senator SPECTER. Well, to the extent that you have any or can find any statistics on that subject, since you have introduced it, we would be interested to receive them.

Dr. CAVANAUGH. I would be most happy to provide them.

Senator SPECTER. So that we could have some basis for evaluating to what extent there is recidivism from those found not guilty by reason of insanity; something more than just your judgmental observations or your feeling for the subject.

Dr. CAVANAUGH. I would be happy to.

Senator SPECTER. We will now hear from Dr. Jonas Rappeport, chief medical officer, Supreme Bench of Baltimore who was a Government expert in the *Hinckley* trial.

STATEMENT OF JONAS R. RAPPEPORT

Dr. RAPPEPORT. I thank you, Senator, for the privilege to appear before you, and I appreciate this opportunity. I have a very brief prepared statement.

I believe the insanity plea as it currently exists in most States and Federal courts requires no alteration. My experience has shown that whether the test used is *M'Naghten* or ALI and whether the burden of proof is on the defense or the prosecution, very few defendants are found not guilty by reason of insanity, and those so found are usually deserving.

The insanity plea is necessary to maintain our view of a moral justice. In one form or another, it has served mankind successfully for thousands of years. In a sense, it is the mark that separates us from the wild beasts. We cannot hold culpable those who were incapable of being morally wrong. Infants, the retarded and severely mentally ill defendants deserve this protection from the harshness of the law.

I can readily understand, Senator, the public's concern about the epidemic of violence in our country. However, to believe that any alteration in the insanity plea will reduce crime and violence is misguided. If we want to do something about violence, let us focus our attention on the jails and prisons of America—overcrowded, understaffed, festering pools of recidivism.

RECIDIVISM

Thirty-five to eighty percent of released prisoners commit subsequent crimes, many of them more serious than the original offense. Less than 10 percent of those who have been found not guilty by reason of insanity and treated in hospitals commit other crimes, and most of these are less serious. My source there, sir, is a current study that is going on in Maryland which is only partially completed. Statements that come from superintendents of maximum security hospitals throughout this country who clearly say that a very small minority of their patients released after NGRI findings return to the hospital or commit other serious crimes.

Senator SPECTER. How many instances were studied in the statistic you just gave?

Dr. RAPPEPORT. I do not have a firm report before me. This is very difficult research to do in view of the fact that it is hard to get FBI statistics. But the estimates given by every maximum security hospital superintendent in the country are within the range of 10 percent or less of their patients that are released.

Senator SPECTER. Who has given such an estimate?

Dr. RAPPEPORT. Dr. Stuart Silver, the superintendent of the Clifton T. Perkins Hospital Center in the State of Maryland.

Senator SPECTER. And what estimate did he give?

Dr. RAPPEPORT. He gives around 10 percent or less.

Senator SPECTER. And what, if you know, facilities does Dr. Silver have for following people who are released?

CONDITIONAL RELEASE

Dr. **Rappeport**. Maryland has a 5-year mandatory followup—conditional release. Such people are released on condition. Maryland pretty much followed the original recommendations of the model penal code.

People released from the hospital after being not guilty by reason of insanity, can, with court approval, be put on conditional release for 5 years. They can request changes in those conditions, but the condition basically is to follow whatever treatment recommendations are made. And for cause, they can be brought back to the hospital.

Senator **Specter**. Are there studies as to what has happened with this group which has been released over a study which expands over a 5-year period?

Dr. **Rappeport**. Dr. Silver did not have all the final figures, but his look at what he did have at this time would indicate in the range of 10 percent, according to my phone conversation with him yesterday.

Senator **Specter**. Are you familiar with any studies which have been completed beyond those of Dr. Silver?

FOLLOWUP AFTER RELEASE

Dr. **Rappeport**. Not any long-term studies on followup that directly relate to this population.

Senator **Specter**. Well, Dr. Rappeport, I would be interested to know of them. I am suspicious of an assertion that less than 10 percent of those who are released by reason of not guilty on a finding of insanity are charged with subsequent crimes of violence. I am suspect until you document it, though you cite it.

Dr. **Rappeport**. Why are you suspect, Senator? You were a prosecutor and you know how many of those people you saw back in court. I wonder why you are suspect.

Senator **Specter**. I am suspect because it is easy to make an assertion. Beyond that point, I would like to know what the basis of it is. How many people were studied and over what period of time?

Dr. **Rappeport**. Yes, sir.

Senator **Specter**. And if you are making an assertion that 10 percent or fewer of those who were released by reason of a finding of not guilty on insanity, I would like to know what your evidentiary basis is for saying that.

Dr. **Rappeport**. Yes, sir.

Dr. **Cavanaugh**. Senator, I think you have to make a separation between those who are released and receive some form of supervised treatment from those who are simply released. When I was giving my 5-percent figure and Dr. Rappeport his 10-percent figure, I think we were referring to those who were simply released with no followup.

In those studies that have been completed on NGRI's who are followed up and treated—and we are completing in Chicago one such study—the rate of recidivism is extraordinarily low, and in our study it is zero in the treated, court-supervised outpatient followup of NGRI's.

Senator **Specter**. How many people are included in that study where the figure was zero?

Dr. **Cavanaugh**. Forty NGRI's, three-quarters of whom had committed murder.

Senator **Specter**. Well, these statistics may be very informative and may be very revealing. I would just like to have some greater specifics on them. I do not find it very helpful when we talk about them in generalizations. It is too easy to generalize about the problem and to appear to come to conclusions when there is no hard fact behind them.

Statistical surveys are very, very difficult to come by, and they require a substantial base and they require a substantial followup. There is a question as to whether 5 years is sufficient and there is a question as to how much you know about the people—how you have tracked them, where they have gone, how well you have kept abreast of them.

Dr. Rappeport, you make a statistic of 35 to 80 percent of released prisoners are charged with subsequent crimes of violence. What is the evidentiary basis for that citation?

Dr. **Rappeport**. I cannot quote particular studies, Senator, but in my work in criminology or my reading of criminology, that seems to be a rather standard figure. I took a spread from every correctional system in the United States. Every major correctional system in the United States seems to report very, very bad recidivism statistics; that is, the chances of most first offenders repeating are very, very high.

As far as I know, there is no State in the United States that has, given other side issues, a correctional system that produces anything better than 35-percent recidivism.

Senator **Specter**. But, Dr. Rappeport, it does not tell us too much to say, as far as you know, no State has avoided the recidivist problem. What is helpful is if there were any statistics which would say that a State has been plagued by recidivism.

The statistics in this field are deplorable, from what I have seen. There are not followups to people who are released from jails so that there is any really solid evidentiary basis to evaluate the problem of recidivism one way or another. That is the problem that I see. We simply do not follow up on people who are released from either jails or mental institutions in any sufficient number to come to any solid conclusions.

Now, if you know of studies to the contrary, we would be very interested to know of them.

Dr. **Rappeport**. Well, I will try and get the chapter and verse, sir, but to my knowledge there have been several recidivism studies based on rearrest rate. Now, whether that is a proper statistic or not is another issue, but based on the rearrest rate, the rearrest rate for released felons, particularly young ones, is exceedingly high.

I think there are numerous studies that reveal that from the California Youth Authority, from the California Adult Authority and from surveys of other prison systems. From just sitting in a courtroom as a prosecutor, I am sure you were prosecuting many recidivists.

Senator SPECTER. I sure have; no doubt about that, and no doubt about the problem of recidivism. There is just very little hard statistical evidence on its scope or the kinds of people who do repeat.

Dr. RAPPEPORT. I do not know what you mean by the scope or the kind. I know every police department in the United States reports that 40, 50, or 60 percent of the people they arrest have previous arrest records.

Senator SPECTER. Well, that just does not tell too much by itself, because an arrest record is not a record of conviction, to start with. There is then the next question as to what has happened to the person after they have been convicted and what their subsequent charge is and as to whether there is a conviction there.

It requires a lot more refinement than just saying how many people have been arrested after a prior arrest.

Dr. RAPPEPORT. After a prior arrest and conviction; I will go that far to say after a prior arrest and conviction. If you are going to go by conviction rates, it is very low because our conviction rates in this country are exceedingly low compared to arrests, which is another factor that we should be very concerned about.

GUNS

To continue, after all, John Hinckley did use a gun. Are we really to believe that guns are OK, or it is just that people use them who are bad? As a psychiatrist, I am tired of the scapegoating of the mentally ill, sir. Let us focus on alcohol and guns, which kill many people, not only the mentally ill.

If we destroy the insanity plea, are we then saying that we endorse violence and simple retribution, another form of violence?

FAMOUS TRIALS

Trials such as the recent *Hinckley* case receive tremendous publicity and arouse great public concern. Yet, this is the first of the recent trials that had great public exposure in which the insanity plea was entered in which the defendant was actually found not guilty by reason of insanity.

Arthur Bremmer, Sirhan-Sirhan, Patty Hearst, Son of Sam, Speck, Manson, Squeaky Fromm, Sara Jane Moore, and John Gacey either dropped their insanity plea and pled guilty or were found responsible and guilty by juries.

GUILTY BUT MENTALLY ILL

Other concepts, such as guilty but mentally ill, actually will require more treatment facilities, which will not happen. The State of Michigan is not funding its psychiatric services, I am told, despite its guilty but mentally ill plea. In fact, it would place more criminals in hospitals and require even more psychiatric testimony.

INCIDENCE OF INSANITY PLEA

Less than 10 percent, sir, of all criminal defendants enter insanity pleas. This is a consistent figure from Michigan, Maryland, Pennsylvania, and Ohio. Less than 2 percent of that 10 percent are found not guilty by reason of insanity.

In Maryland in 1980, out of approximately 10,000 felonies, we had 300 insanity pleas that were officially entered in felony court, and 30 were found not guilty by reason of insanity. Most of those were uncontested; that is, cases in which the prosecutor clearly accepted and recognized that the individual was so severely mentally ill that he could not morally hold them responsible.

Senator SPECTER. Over how long a period of time, Dr. Rappeport?

Dr. RAPPEPORT. This is the year 1980.

Senator SPECTER. 1980?

Dr. RAPPEPORT. Yes, sir.

Senator SPECTER. And there were 300.

Dr. RAPPEPORT. 300 insanity pleas entered in felony cases. In misdemeanor court, there are a lot more entered for other reasons.

Senator SPECTER. 300 insanity pleas on the button?

Dr. RAPPEPORT. Not on the button, sir. I would say more or less 5 percent. These are the figures given to me by the hospital.

Senator SPECTER. 300 which would be 5 percent.

Dr. RAPPEPORT. Plus or minus 5 percent, yes, sir.

Senator SPECTER. Out of how many pleas?

Dr. RAPPEPORT. Approximately 10,000 felony cases.

Senator SPECTER. And there were 30 acquittals by reason of insanity?

Dr. RAPPEPORT. Yes, sir, and most of those were uncontested by the prosecutor.

Senator SPECTER. Thank you.

Dr. RAPPEPORT. The public seems to have the impression that hundreds of defendants are "getting away with murder." Most guilty by reason of insanity defendants spend more time in hospitals than they would have spent in prison, had they negotiated a plea.

TIME HOSPITALIZED

Dr. Henry Steadman has done a very excellent study in the State of New York, published in the American Journal of Psychiatry, Steadman, H. J., "Insanity Acquitals in New York State, 1965–78," 137, AMJ of Psychiatry, March 1980, 321–326, indicating that individuals spent more time in the mental hospital than they would have spent in prison had they negotiated a plea.

Senator SPECTER. When you say they spent more time in hospital, what is the average amount of time spent in hospital?

Dr. RAPPEPORT. My recollection is something in the range of 4 to 4½ years. I think it was in the range of 48 months.

Senator SPECTER. But does the study show the specific amount of time?

Dr. RAPPEPORT. Yes, there is a specific statement in the study.

For public safety, reason and morality, I do not believe we should forsake a few unfortunate souls in our quest for revenge.

I am aware that there is great public concern and pressure upon this Congress to do something. However, Congress has always been noted for avoiding so-called knee-jerk or precipitous legislation in response to public pressure. I ask you to move slowly, sir, with the same investigation and deliberation that you always use.

BLUE-RIBBON COMMITTEE

I would suggest that perhaps a blue-ribbon committee be appointed, composed of judges, lawyers and psychiatrists, to conduct an in-depth study without undue haste and make recommendations to the Congress. I thank you, sir.

Senator **Specter**. Thank you very much, Dr. Rappeport.

Dr. Ernst Prelinger, clinical professor of psychology in psychiatry, Yale University, who was a defense expert in the *Hinckley* case. Welcome, Dr. Prelinger.

STATEMENT OF ERNST PRELINGER

Dr. **Prelinger**. Senator, it is a privilege to be here. I also have a very brief prepared statement which contains some ideas on how to present evidence in insanity defenses to assist juries.

The previous comments move me, however, to start with an additional impression in relation to the statements made. I am a specialist in making psychological evaluations, and I have, all together, examined about 30 murderers with the question of whether an insanity defense should be attempted or not. In just about half of these cases, the evaluation showed that no insanity defense could justifiably be attempted.

In the other half, roughly 14 people, nine insanity defenses succeeded. Now, from the study of these murderers, one trend emerged very clearly. They seemed to fall into two classes, psychologically speaking. There are those who, in the course of their development, have formed very generalized aggressive attitudes, usually borne out of some severe personal conflicts. They may have committed this serious crime in a state of insanity but all evidence pointed to the fact that they would continue to be dangerous regardless of how long they might be hospitalized.

There is a second group of defendants who quite clearly, in their violent act, resolve one particular, terribly powerful emotional problem. Into such classes fall, for instance, murders committed out of jealousy or murders of the bizarre sort directed against parents.

Very often with these people the psychological constellation is such that after they have committed this deed, the particular conflict was resolved, albeit in a very regrettable manner. In the future most likely no further violent acts would be expected.

I believe that it makes sense to study the statistical cases, also, in terms of their motivations.

PRESENTING EVIDENCE IN INSANITY DEFENSES

Now, to come to my statement, which has something to do with how to present evidence in insanity defenses, I believe that the juries in cases in which an insanity defense is tried can be best served if psychiatric and psychological evidence is brought forth which tells in concrete terms the facts of the defendant's life history, the circumstances of his early development, the positive and negative influences under which he grew up, the kind of family life he has experienced, and the particular emotional issues or conflicts which relate to the act he is charged with.

Detailed descriptions should be given to the jury by the experts of the defendant's capacities for normal adaptation and of the specific impairments of such capacities, if they are present.

The jury should be told what was learned about these matters through psychological tests and clinical interviews. Relevant medical findings should be presented, and their effects on the defendant's capacity or incapacity to adapt should be spelled out. Pathological behavior patterns should be described in detail.

If such specific testimony were given, it is likely that experts on both sides would disagree relatively little. Testimony in terms of psychiatric diseases and of diagnostic terms, to my mind, should be minimized. It places undue and confusing burdens——

Senator **Specter**. Excuse me, Dr. Prelinger. What did you say should be minimized?

Dr. **Prelinger**. The use of psychiatric diagnostic terms, references to psychiatric diseases, and so forth. Such testimony places undue and confusing burdens upon the jury. If such testimony is given, the jury has to be taught first what the psychiatric diagnostic terms mean, and then it has to be convinced that the defendant fits a given proposed diagnosis. And that, in the end, still leaves the relevance of the diagnosed disease to the legal issue of diminished capacity to be shown.

I personally believe strongly that the presentation of the kind of specific evidence I have described is best done within the adversary system. The so-called ultimate question ought not be answered by the psychological-psychiatric experts, but left for the jury to decide, with the help of the material about the defendant presented to them.

I do not think that court-appointed bodies of psychiatric-psychological experts would be suitable to do this job. If they were to stand outside the adversary system, their pronouncements might carry much more authority in the judgment of the jury than the present state of the art justifies.

Senator **Specter**. Thank you very much, Dr. Prelinger.

We have just been joined by Senator Heflin, my distinguished colleague from Alabama. Senator Heflin, do you have an opening statement which you would care to make?

Senator **Heflin**. I would maybe defer a little bit. I have got to look at it.

Senator **Specter**. All right.

Senator **Heflin**. I have not reviewed it yet.

Senator **Specter**. We have just had opening statements from Dr. Cavanaugh, Dr. Rappeport, and Dr. Prelinger on a variety of subjects.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator **Heflin**. I would like to make a statement from the top of my head; it would be a curbstone or horseback statement without a lot of thought being crystallized.

We had hearings with five of the jurors, and there has been a lot of national debate and a lot of interest in this issue. I have a feeling, largely arising from a statement by the American Psychiatric

Association, that psychiatrists are put into a rather tight box, and that in the present situation of the issue of not guilty by reason of insanity or the issue of guilt which goes to the basic state of mind, a "yes" or "no" answer is an extremely difficult answer that puts the psychiatrist and, according to one of the jurors, puts a jury pretty much into a box.

There is a lot of gray matter. A person could be suffering temporarily from a disease of the mind which could be involved as to whether or not the person is responsible. Really, there needs to be some type of an approach different from just strictly "yes" or "no." Maybe there ought to be classifications in the criminal justice system as to whether a person is not guilty by reason of insanity or whether a person is guilty—as to whether or not there are classifications within it that juries ought to be instructed about where juries would have more freedom to make findings; also, in the field of psychiatry as to expert testimony.

The other issue, of course, is the burden of proof, which the chairman today has addressed in a bill that he has. I think this is something that needs to be explored—the burden of proof issue—and then whether or not there ought to be alternate and different classifications of verdicts within the two that we have at the present time.

It puts the psychiatrist in a rather tough position to testify; he has to make a decision. Basically, it is past history. The psychiatrist is looking at the accused, and he is looking at him in a present-day situation. He has to make a determination of what the degree of the disease of mind was on the date that the incident occurred, as well as a classification of whether or not the disease of the mind overcame his will or overcame his ability to resist.

I am not clear in my thinking; I have not crystallized my thinking. But I think that there is an area that we ought to explore in this regard. I make that statement, and if you have thoughts or comments about it, I would be interested in hearing them.

Dr. CAVANAUGH. Senator, I have just two brief comments. I think we can agree as psychiatrists that when we are asked to evaluate the current mental status or psychological status of an individual at this point in time, our diagnostic abilities are quite good. A number of studies recently available show that when two qualified psychiatrists at a point in time evaluate the same individual, they come to the same general conclusion approximately 80 percent of the time.

You were I think very appropriately pointing up that one of the difficulties that the psychiatric professional has, looking at the insanity defense, is the evaluation is back in time; it is a retrospective assessment. The defendant is here today and I and my colleagues are being asked to look at the mental status a week ago, a month ago, a year ago, and that is certainly, as you rightly pointed up, an area of difficulty in this process.

But in the final analysis, under our current standards, someone has to do it. And the issue that I am sure the Congress is looking at is who might be the best qualified to do this and under what circumstances.

My second brief point is that the burden of proof question, as you related, is a terribly important issue. I think here, in contrast to the psychiatric evaluation process—the arriving at a diagnosis, which truly and appropriately is the purview of the trained psychiatric physician—when you get into the issue of burden of proof, it is a much broader concept, and I think we ultimately get into social and political issues. I think it is a problem for anyone involved in the insanity defense process to, on the one hand, feel as a psychiatrist that you have something to offer at the level of psychiatric diagnosis for the reasons that I mentioned, and then apply this conclusion to a much broader social-political issue that is contained within the standard proof. I think those are separate, distinct issues.

Dr. RAPPEPORT. Senator, I think your idea of the jury having various levels or degrees or gradations may have some merit. I think it certainly requires further study since juries do not ordinarily have that level of experience.

I recently had the unique experience as a physician to, in fact, sit on a jury. Baltimore County has a one-trial jury panel so that everyone, including judges, are required to come for jury duty. We had no professional testimony other than a police officer, and the jury had to struggle with making a decision.

The adversarial system certainly increases the polemics and the positions of experts, but I do not feel that psychiatric experts have any greater difficulty in agreement or disagreement than do any other experts. The law does not call upon experts, or lawyers do not, unless there is some reason to believe that there can be some disagreement.

The system of the adversary system pushes these people to present their disagreements and also, of course, their agreements. But whether they be economists, accountants, appraisers, cardiologists, neurologists, or pathologists who use their microscopes, there is still disagreement in case after case.

We would like, I believe, as individuals to think that our good old doc knows the answers and he tells us the answer right away, and that he does, because the art of medicine requires that he not tell us all of the concerns he has. In the courtroom, many of these concerns about the illness may come out as differences.

Senator SPECTER. Before Senator Heflin had made those opening comments, I had not had an opportunity to comment, albeit briefly, on the opening statements.

Dr. Cavanaugh, I think that your concerns about what happens to people who are found not guilty by reason of insanity are very valid, and I think that the *Hinckley* case ought to lead us to an examination of those issues.

The question of as the appropriate scope of detention for someone found not guilty by reason of insanity is a very important consideration, and one of the items that we are studying is what can be done to Hinckley himself, whether it would be appropriate to have some refined standard, some changed standard, for his detention, or whether that would constitute a double jeopardy or some impermissible ex post facto application of the law to have a new standard for Hinckley's detention which was not in effect at the time of March 30, 1981, the time that he shot the President and the others.

The issue of treatment is a very important one. When you talk about the broadened civil commitment standard and the outpatient treatment, those are questions which really have to be addressed.

Would you have any idea as to what that kind of a program would cost?

Dr. CAVANAUGH. The type of program that I presented in my brief testimony related to a specialized outpatient psychiatric treatment center. I am only obviously familar with the costs in our program. Now, we serve Cook County, which is a very large county jurisdiction.

Senator SPECTER. And how many do you serve in your unit?

Dr. CAVANAUGH. In our unit presently, we have between 60 and 65 patients. About three-quarters of them are individuals who have been found not guilty by reason of insanity, so between 40 and 45 of our current patients are NGRI clients.

Senator SPECTER. It seems to me a rather small group coming from a county as large as Cook County.

Dr. CAVANAUGH. I know it may seem that way, but the reality is that that represents presently in Cook County 80 to 85 percent of all individuals in Cook County who have been found not guilty by reason of insanity who are currently out of institutions.

What I am trying to illustrate by this is that it is a low figure, but I think this gives a perspective on some of the issues that Dr. Rappeport was bringing up; namely, though it stirs up a great deal of feeling when we talk about the insanity defense, relatively few defendants raise it any way, and then ultimately even a smaller number are actually found not guilty by reason of insanity.

Senator SPECTER. All right. That leads to the question which we will come to in due course about how many could raise it if they had the money to do so, if they had the Hinckley financing.

Dr. CAVANAUGH. Could I respond to that?

Senator SPECTER. No, not right now; you can later. Let us just deal with one question at a time. The question is how much does it cost? How expensive is it to provide this kind of psychiatric outpatient care for the 60 to 65 people you have?

Dr. CAVANAUGH. We receive from the State of Illinois, through the Illinois Department of Mental Health, a grant presently of approximately $210,000 per year to run the entire clinic. That is to pay for the overhead of the clinic, to pay for the professional salaries of the staff.

We estimate that the cost per patient per year is about $4,000 a year.

Senator SPECTER. And how frequently are those 60 to 65 people able to be seen by the number of doctors and the facilities you have available?

Dr. CAVANAUGH. It is variable based on the needs of each individual patient, but an average is no less than once a week and many are being seen two times a week, three times a week. Sometimes, these are individual treatment sessions; sometimes, they involve family, if the patients have families, or marital sessions—whatever seems to be clinically necessary.

The frequency of treatment, as in all treatment situations, is really directed toward or determined by the needs of the individual patient. But I think we have the capability to do anything that is necessary in terms of treatment, medications or rehospitalization, if that is necessary.

Senator **Specter**. Well, that is very interesting, and I am sure the committee would be interested in the follow-up as to the details on how much it costs and how many people you treat, so we can get some idea as to what we would be looking at by way of expense when we look at this aspect of the issue. I quite agree that this is one aspect which we ought to consider.

Dr. **Cavanaugh**. We are completing the first major study of this project, and I will be certain, and it will be a pleasure, to send you a copy of our report.

Senator **Specter**. OK, now on to the other question. The question is how many people who are charged with acts of criminal violence could muster as good an insanity defense as Mr. Hinckley if they had the money to hire the psychiatrists and lawyers to organize and develop that defense?

My own experience from dealing with large numbers of people charged with crimes of violence is that there would be a very large number of people who would have family problems, who would have childhood disorders, who would have poor experiences in school and bad work experiences, who have had very grave difficulties with their parents, who have had work records, and who would have personality disorders.

So, in assessing this problem myself and in coming to an evaluation from a lawyer's point of view, a prosecutor's point of view, and with some experience as a defense lawyer as well, I think upward of 70 percent of people who are charged with crimes of violence could muster as good an insanity defense as Mr. Hinckley if they could afford the battery of psychiatrists and the battery of lawyers to organize that kind of a plea. I would be interested in your thoughts on the subject.

Dr. **Cavanaugh**. I think that is an interesting comment or observation. I have to really be guided by my experience in Cook County, where, as Dr. Rappeport was indicating, at most 10 percent of all criminal defendants at some point raise the insanity defense in any manner.

Senator **Specter**. Dr. Cavanaugh, I agree with you that very few do. I think the percentage is even less than 10 percent who raise the insanity defense, but that is really a product of how much analysis there is.

When someone comes into a criminal courtroom—and in Philadelphia, we processed 30,000 cases a year—it is a very, very rapid process. Relatively few have private counsel, to start with; most are with the public defender. And even those who have private counsel are not sufficiently affluent or rich to provide a lengthy period for an examination.

An ordinary lawyer questions a client who is charged with an act of criminal violence in a very brief period of time, without going into the extensive kind of background which might provide the seeds for a defense of insanity. And if you do make that inquiry, then to have expert testimony and to have the kinds of batteries of examinations to go and look over a person's background and school records—the sorts of things they might not be able to tell you—is a very involved process.

So, if you really want to be imaginative as a lawyer in pursuing a defense which might have an evidenciary basis under the *Hinckley* standard, the sky is the limit.

Dr. **Cavanaugh**. I think that it is certainly possible for what you outlined to happen in cases of that type. I think the record, though, in the country is that even with those possible approaches and the defendant having access to unlimited sums of money to have experts evaluate and testify, in the vast majority of cases the individual is not exculpated by reason of insanity.

They either drop the plea because there is no basis for it, or they go through the criminal justice process, the trial process, and they are found guilty.

Senator **Specter**. I agree with that as well, and there are long lists of very celebrated cases which have been reviewed in this proceeding where the insanity defense just has not worked. By and large, where the insanity defense has worked, it has been a very badly deranged person.

It is true, as Dr. Rappeport outlined, that most insanity conclusions are by agreement of the prosecution. I, for one, do not believe that the insanity defense should be eliminated. I am not prepared to rush to the elimination of the insanity defense. I do not believe in "guilty but insane" because I do not know where that leaves you, although I am prepared to consider it.

But we have a new standard today, potentially. Maybe the *Hinckley* case will come and go and will not have any significant impact on American criminal law. But if we are to use the *Hinckley* standard, my personal concern is that it is an open invitation by that standard for the wealthy who can afford to get into the facts of background to successfully plead insanity to the same extent that John Hinckley could.

John Hinckley looked to me in the upper 2 percent of the more sane people who come through the criminal process. If you want to go by backgrounds and by opportunities, Hinckley had a great background and great life compared to most people who get into the criminal justice system and who are charged with crimes of violence.

FAIR TRIAL—MONEY

Dr. Rappeport, I would be interested in your observation.

Dr. **Rappeport**. Senator, I think one of the perhaps inequitable parts of our criminal justice system has always been that those who have money can afford what may be a better defense.

One of the very wonderful things about our criminal justice system is that this has not always bought a trial in your favor. I assume the Hearsts have as much money as the Hinckleys, or maybe more; I do not know, sir. But the Hearsts were not, so to speak, able to buy an insanity plea for Patty.

I think that in my experience in civil or criminal trials, he who has the money and can afford to hire the best attorneys may have some leverage. Now, in a medical office like the supreme bench medical office for the city of Baltimore where we occasionally do pretrial evaluations, we have tremendous resources available to us, if we feel that it is appropriate to use them, to do all sorts of investigations and carry things out.

Senator SPECTER. But when you do those investigations, you are looking at it from an objective point of view. You are not advocate for the person charged with an offense.

Dr. RAPPEPORT. No, sir.

Senator SPECTER. You are not trying to make an analysis in the light most favorable to the defendant to see if you can find, appropriately so, an insanity defense.

BALTIMORE CITY COURT CLINIC

Dr. RAPPEPORT. We attempt to do a thorough and complete evaluation, and whichever way our result falls, that is the way we would so report and testify. But we do all of the things, within limits; again, the most extreme limit is sending my social worker down to South Carolina to interview some families. But we always get records from schools, the probation department, the police, and what have you.

Senator SPECTER. How long is a typical interview? You do not examine everybody who is arrested in the criminal justice system?

Dr. RAPPEPORT. No, sir. We only examined the people that are referred by the court. In fact, in our jurisdiction, at the circuit court level, no one, unless he is in need of immediate care, is sent to the State hospital for evaluation upon entering an insanity plea, unless he has been screened by my office.

Senator SPECTER. Well, by that standard, John Hinckley would never have gotten to your office.

Dr. RAPPEPORT. I cannot comment on that, sir. But this is how we operate, so that many times counsel, in fact, could enter a plea or tell the court they are considering a plea, and we will screen the man, and see him for varying periods of time—a half hour or an hour—along with other information, at which time we can then tell counsel we cannot find anything.

Now, we maintain on screening a very low threshold, so the more serious the crime—if the crime is terribly serious, the man may deserve a chance to be examined in the hospital.

But I would like to comment, unless you want more discussion of that, about the outpatient treatment of people who are found not guilty by reason of insanity.

Senator SPECTER. I would be pleased to hear your comments on that, Dr. Rappeport.

PUBLIC CONCERN

Dr. RAPPEPORT. I recognize, again, the public's concern. One thing that I think is important is that people confuse two things. The newspapers very frequently report that *x* mental patient commits a crime. That was not a person who was found not guilty by reason of insanity. Most frequently, that was a person who was hospitalized. Since mental hospitals admit alcoholics, addicts and others, the public misconstrues.

However, the system Dr. Cavanaugh describes is a very excellent contractual system. The system in Maryland, I think, is very excellent, and the cost is minimal—the system in Maryland in which the maximum security State hospital operates an outpatient clinic, as should any other psychiatric hospital, and treats individuals with their expertise until the individuals are ready to return to any part of the community.

We have a graded release from the hospital, where people go to a halfway house, work in the community, or what have you. We now have a program where people can go anywhere in the State of Maryland and they will be trailed by the forensic program. So, the people who are treating these people may be 100 miles away from the hospital; they know this is a special case who has had problems with violence and requires special care. We are establishing a very excellent tracking system. I do think that this is something that does need to be considered.

Senator SPECTER. Dr. Rappeport, you had referred earlier to a study. Was it the study by Dr. Henry Steadman?

Dr. RAPPEPORT. Yes, sir.

Senator SPECTER. I have the text before me from what appears to be from the American Journal of Psychiatry.

Dr. RAPPEPORT. Yes, sir; that is March 1980.

Senator SPECTER. Yes. Here, there is a listing of 55 murder defendants with a range of time spent from 1 day to 2,326 days, for a mean of some 500 days, which is about 1⅓ years, which is a lot less than people would get on a murder charge even with a plea bargain.

Dr. RAPPEPORT. I think if you read further in Dr. Steadman's data, as I recall it, sir—and I have not reviewed it for a few days—my figure was still not incorrect. People were still in the hospital for a period of time—approximately 48 months.

Senator SPECTER. Well, I am very much concerned about the statistics which were cited with lack of precision in terms of what they mean. We have a high visibility Senate hearing. I really want to pin down the statistics as to what we are talking about.

I have before me a chart which has a list of 131 defendants, and the mean amount of time spent is 406 days, which is a little over a year; in the manslaughter category, 5 people with a mean of 350 days. It simply is not accurate to say that people who are in the circumstance of being found not guilty by reason of insanity spend as much time in the hospital as if they were convicted.

Dr. RAPPEPORT. Senator, if you look on page 325, 40 percent of the defendants acquitted from 1965 through 1976 remained in the hospital for an average of 1,701 days, and fully 89 percent of those who were acquitted in the past 2 years were still hospitalized as of June 1978. This study, I think, covered until—I think when he says the past 2 years, he means from 1976 to 1978.

Senator SPECTER. Well, we are referring to the chart on page 325.

Dr. RAPPEPORT. All right, sir.

Senator SPECTER. We have 55 defendants charged with murder who spent a mean time of 500 days.

Dr. RAPPEPORT. Yes.

Senator SPECTER. Are you saying that you believe that that is how much time people would spend on a conviction for murder?

PLEA BARGAINING

Dr. **Rappeport.** Not on a conviction for first degree murder, absolutely not, sir. But we are not talking about 55 people getting first-degree murder convictions. I suspect there are not 55 people in the State of New York in any given year who get first-degree murder convictions. Maybe there are, but——

Senator **Specter.** There certainly are, in Philadelphia. We tried 500 a year and had more than 55 convicted of first degree murder.

Dr. **Rappeport.** And when you were a prosecutor, sir—and I do not know how long ago that was—how many plea bargained down to second degree for manslaughter? A large percentage of people plea bargain.

Senator **Specter.** Not very many in Philadelphia, Doctor. [Laughter.]

The standards which we had from 1966 to 1974 led to the position by the National Commission on Criminal Justice Standards and Goals, published in 1973, to abolish plea bargaining. I think plea bargaining is a very bad practice. We did not engage in it in Philadelphia.

But that is aside from this chart and this topic, and the chart has a distinction between manslaughter, which is a lesser form of homicide, as you know, where they separate that out. There, the mean time is 350 days. And on robbery, where there are 10 cases analyzed, there is a meantime of 188 days.

Those statistics simply do not support an assertion, that even if you take a plea bargain, that is the amount of time a person would spend in jail.

Dr. **Rappeport.** Senator, I would feel more comfortable if you called Dr. Steadman and had him come and testify. He is one of the leading experts on followup studies in the criminal justice system from the State of New York.

Senator **Specter.** Well, we may do just that, but, when you quote Dr. Steadman's statistics, I think it is important that they be disclosed accurately.

I would like to come back to the first question which I came to at 9:30 which I consider to be the really central issue in this hearing, although there are a great many important subjects, and that is when a jury gets the charge, which is the law, about how they are supposed to interpret the law in relationship to the evidence, the central question which we face, gentlemen, in my opinion, although the others are important—how we are going to deal with rehabilitation, how we are going to handle people on an outpatient basis, and the kind of care in the overall system—but the threshold question is, What does a jury understand; what can the psychiatrist shed light on, in terms of the existing legal standard?

I break that into three parts: What is the legal standard; what do these terms mean to the psychiatrist; and what are they likely to mean to jurors? So that, when we try to protect society from acts of violence, and have an appropriate balance for the rights of individuals, and for those who are really insane, to separate our society from the beasts, as testified to earlier, we have something which is understandable and meaningful.

When the law, through a judge's charge, says a defendant lacked substantial capacity to appreciate the wrongfulness of his conduct—Dr. Prelinger, let us start with you—does that have any meaning which is translatable into the expertise of the psychologist or psychiatrist?

Dr. PRELINGER. Senator, I believe it has. I do think, and this is in line with my statement, that this kind of standard can have meaning to a jury if the evidence is put forth in descriptive categories.

There has been, I believe, a general tendency on the part of forensically working mental health workers to assume, for instance, that insanity and psychosis are somewhat equivalent. I do not think this is true. I believe there could be people that psychiatrically carry a diagnosis of psychosis who nevertheless could not be found to lack capacity under the legal standards.

I believe, similarly, that there are people who are psychiatrically diagnosed with other labels who nevertheless can be shown to lack substantial capacity.

Senator SPECTER. Dr. Prelinger, does the term "lack of substantial capacity to appreciate the wrongfulness of his conduct" significantly differ from the simple definition of knowing right from wrong, in your professional judgment?

Dr. PRELINGER. I believe, yes. The customary statement of knowing the difference between right and wrong, I think, refers too much to conscious thinking. I believe there are people who can, if asked whether a particular act is right or wrong, give a perfectly good answer, and nevertheless feel that in the circumstances of, for instance, their delusional system, they personally have every right to do that act.

So, the capacity to appreciate the wrongfulness of one's act is not only intellectual, but it is also an emotional matter. And in this regard I think——

Senator SPECTER. You say it is not only what kind of a matter, but also emotional?

Dr. PRELINGER. Not only an intellectual matter; it is not only a question of the person's conscious thinking. It is also a question of the much less conscious convictions he has in terms of his rights, his own delusions, and so forth.

I think it is in this field, for instance, that the psychiatric expert can make a contribution. He can describe the circumstances under which a particular defendant will feel entitled to do an act even though he may consciously know that it is against the law.

Senator SPECTER. Well, in what circumstance would a defendant feel entitled, as your phrase is used, to commit an act even though he knows it is against the law?

Dr. PRELINGER. Here is a hypothetical example, although I am thinking of a case in Connecticut a good many years ago: A man strangled his girlfriend because he had the belief that she was unfaithful to him. He knew perfectly well that this was against the law to do. At the same time, he felt that by divine right he was entitled to punish her in this manner.

Senator SPECTER. Would you think that that range of entitlement—it is a new definition, congressionally, for an entitlement—but would you think that that kind of an entitlement could be the basis for a jury saying, "not guilty by reason of insanity?"

Dr. **Prelinger**. If set into the wider picture of this person's disturbance, I believe, yes.

Senator **Specter**. Well, how could that be if, at the same time that he performs that act, he knows it is against the law?

Dr. **Prelinger**. Sir, I remember, years ago when I participated in some insanity defenses, a question I was often asked was: Would this man have done it if a policeman had been right there?

We can think of recent cases where policemen were right there and the act was committed nevertheless. So, I can picture such situations very well.

Senator **Specter**. That might be a standard, if a man feels strongly enough about it to do it with a policeman right there. So, whatever you do, make sure a policeman is at hand.

Senator **Heflin**. Well, if that is true, what do you do about Hinckley? That element is supplied in the *Hinckley* case; is it not?

Senator **Specter**. It is not supplied, Senator; it is a super-abundance of supply. There were many policemen around.

Dr. **Prelinger**. Yes, there were.

Dr. **Cavanaugh**. Senator, maybe another type of example would help illustrate this. As physicians, we sometimes encounter the situation where a woman after giving birth enters into a period of depression or mood disturbance. This phenomenon can be called a post partum depression.

Many women experience some type of mood change immediately after or some days after the birth process. In a few cases, a situation clinically arises where the depth of the depression becomes so severe that the woman meets the criteria for a psychosis. Her thinking, her judgment, her reasoning can be impaired.

There have been a few cases—and we happen to have experience with this in our clinic in a case where a woman, in the 4- to 5-day post partum period, became profoundly depressed and killed her child. The issues that emerged were at the time that she did this, did she know what she was doing was wrong, and it was fairly clear that she did. In other words, she knew that this was her child and that she was going to kill the child, and did kill the child.

What made this particular woman qualify for the insanity defense standard, which is here in the District of Columbia and is the same one that we have in Cook County—the American Law Institute standard, which you read a few moments ago—was that the depth of the depression, a psychiatric illness, was so severe that it did impact upon her capacity, as it were, to make a judgment as to whether or not she was going to go ahead with this act to end the life of her child.

She was thinking about this because she was so terribly pessimistic about the future that she was feeling that this child had no future and the world was entering a period of decay and disruption, so she would, in a sense, be saying to herself, "I am doing this child a favor. I know I am killing the child, but I am doing the child a favor because I think the world is a miserable place to live."

Senator **Specter**. You are saying at that time, she knew the act was wrong?

Dr. **Cavanaugh**. She could be determined to know the act was wrong, but could still meet the insanity defense standard.

Senator SPECTER. How can she, at the same time, both know that the act is wrong and have a state of mind that she is doing the child that she is about to murder a favor?

Dr. CAVANAUGH. Because it gets into the issue of what her motivation is for doing the act, and this is what the American Law Institute standard and, briefly, the *Durham* standard before it did; namely, looking more indepth at the motivation and the reasons behind the commission of the act even in those situations where the individual might have the intellectual capacity to know what they were doing was wrong or against the law.

Senator SPECTER. Well, Dr. Cavanugh, you give an example and Dr. Prelinger gives an example where in both of your cases the person knows what they are doing is wrong. And yet you find some explanation which would justify not guilty by reason of insanity.

My own sense is that from a legal point of view, if the law finds that the person knew at the time of the commission of the act that what they were doing was wrong, it is not justifiable; it is not excusable. It is not something where you could say "not guilty by reason of "insanity," if at the time of that act, they know that it is wrong.

Dr. CAVANAUGH. Well, I think that gets into, then, a difference of opinion as to how the insanity defense standard has evolved in the country, because in Cook County this woman, by virtue of a postpartum psychosis, under the American Law Institute standard, would be found not guilty because it would the judgment that at the time she committed the act as a result of the mental illness state that she demonstrated—namely the post partum psychosis—though she knew that she was killing her baby, the reason behind it or the mental state that she demonstrated at the time, which was a byproduct of the severe mental illness, the postpartum psychosis, would result in her being found not guilty by reason of insanity.

Senator SPECTER. Let me interrupt this line for just a minute.

Senator HEFLIN. I have got to go.

Senator SPECTER. Senator Heflin has to go and wants to ask a question.

Senator HEFLIN. I am dividing my time between two hearings, and I am going to come back.

Under your statement of facts, what is the difference between that standard and the irresistable impulse?

Dr. CAVANAUGH. The irresistable impulse—and here I will defer to my other colleagues on the panel to help me out—developed in those jurisdictions primarily that had the *M'Naghten* standard, which is the strict, "right or wrong" standard.

Senator HEFLIN. I understand that. You went off on *M'Naghten* on right and wrong, and now you have gone into a standard under the American Law Institute. But what is the distinction between the irresistable impulse where a person does know that it is right and the standard that you are stating here?

Dr. CAVANAUGH. I think that the irresistable impulse addition to *M'Naghten* does move the standard in many respects fairly close to the American Law Institute standard. Under the American Law Institute standard, in most practical applications you are looking at the presence of a mental illness, a disease process that has been in existence for a period of time prior to the actual commission of the crime.

Irresistable impulse, in my experience, which has been very limited because in Cook County we do not have that—in Illinois we do not have that—really addresses a situation where at one particular moment in time, almost instantaneously or for a very brief period, there is hypothesized to be a breakdown in psychological functioning that affects the judgmental capacity of the individual.

Senator HEFLIN. Well, in putting a period of time into the *M'Naghten* disease of the mind on right and wrong, in effect, I gather you are saying that *M'Naghten* requires an existing disease of the mind. You are saying this comes up as a result of the depression.

M'Naghten has never stated the length of time of the disease, but it is a disease of the mind which goes toward right and wrong. If you know right, then you are faced with the additional factor of irresistable impulse.

I believe, frankly, that we have gotten ourselves off into a lot of semantics and words. There is not a lot of difference between these. I do not believe the jury is really aided a great deal by these additional standards in regard to this. I am openminded, but I am not sure that you make a real distinction between *M'Naghten* and the American Law Institute under the scenario of facts that you came forth with.

Dr. CAVANAUGH. Well, really, I was making more of a distinction between *M'Naghten* plus irresistible impulse in comparison to the American Law Institute standard. I think there are a number of differences between the straight *M'Naghten* standard and the straight American Law Institute standard.

But you are correct in saying that neither has specifically defined the length of time or the period of time of identifiable mental illness that an individual must have in order to "qualify."

Senator HEFLIN. I have to go, but I will be back.

Senator SPECTER. I think Senator Heflin is certainly right when we talk about semantics. But when we talk about the specific cases, I think we may be making some progress.

When we talk, Dr. Cavanaugh, about this woman who is killing her baby, when we talk, Dr. Prelinger, about this man who is strangling his girlfriend, both of you say that in your situations a person can be not guilty by reason of insanity even though at the time they commit those acts, they know what they are doing. Let us pursue that a moment, Dr. Cavanaugh.

Why should a person be exonerated or found not guilty when she strangles her baby if at the time she commits that physical act she knows that she is strangling her baby? Why should there be any justification?

If her depression is such that she does not know what she is doing, then it is understanable, perhaps. But if she thinks it is a terrible world, that is exactly the kind of conduct that we do not want to let any person decide for the life of another.

So, as long as she knows what she is doing, why set up standards, psychiatric and legal, which say she is not criminally responsible for her act?

Dr. CAVANAUGH. That is an excellent question, and my only response would be that the reason we do it is because society, through its political and legislative process, not only in this country but in England before us, made the determination or was of the opinion that individuals to be found guilty of a crime not only are to be shown to have committed the crime, but to have had the mens rea, the mental intent, to commit the crime in order to be found guilty and to be held responsible, as a result, for the crime that they committed.

I think that this is ultimately a complicated philosophical, moral, political issue for any people to struggle with. That is the reason we have this situation today that you just enumerated.

Senator SPECTER. Well, when you say legislatures have made these determinations, interestingly enough that is not so with the Congress. The Congress has never legislated on the subject of insanity. I do not know to what extent other States have legislated on the subject, but the definition in the ALI comes from a judicial interpretation. *M'Naghten* was a judicial interpretation.

When you talk about the moral and philosophical basis for not only the act being committed, but there must be a mens rea, that is satisifed with a knowing and an intentional act. The defense of insanity is something totally separate and apart from mens rea.

The prosecution must show that there is mens rea; not only was the act committed, but there was a knowing, intentional act—an understanding of the act. But having satisfied that, the defense of insanity characteristically comes up; that there was some mental process that so deranged the individual that he did not understand the nature and quality of the act.

So, in dealing with the specific case of the woman who killed her child, you say that she knew what she was doing. Then what is the justification for saying she is not criminally responsible for that act?

Dr. CAVANAUGH. Well, the only justification would be the acceptance by society at large that this woman at the time she committed this act was suffering with a mental illness or a mental disease called a post partum psychosis or a severe post partum depression that, in effect, was the critical determining factor as to why she did what she did.

Senator SPECTER. But the critical question is how much could that disease affect her conduct? If it eliminated her knowing of the intentional act, then I would agree that, by civilized standards, she should not be responsible. But if it did not affect her knowing of the intentional act, then why should we excuse her and say that she has not committed the criminal act?

Dr. CAVANAUGH. Well, historically, then again, that is for the jury to decide. The psychiatrist evaluates the individual—in this case, the lady with the post partum psychosis—renders a diagnostic opinion, tries to convey as testimony or in the professional report what the relationship is between the illness and the criminal behavior, and states that. That becomes part of the fact basis in the trial of the case and is presented to the jury in the context of the particular insanity defense standard that is operative in that jurisdiction.

Senator SPECTER. Well, Dr. Cavanaugh, I do not think we ever have really dealt with it historically. I think we have tried to deal with it in a variety of contexts, and I am not saying we are dealing with it here today or are going to deal with it, but we are trying again.

But I do not know that we have ever really come to grips with the central question as to how the individual defendant's capacity has to be impaired. And if you come right down to the brass tacks and you say that woman when she killed her child, or that man when he killed his girlfriend, knew what he or she was doing and intended to kill the person, even though they had some supervening reason in their own mind that it would be better for the child, well, you just do not let mothers make that decision for their children, or boyfriends make those decisions for their girlfriends.

Dr. Prelinger, you have been wanting to come back to your case.

Dr. PRELINGER. Yes.

Senator SPECTER. I will come right back to you, Dr. Rappeport, in a minute.

Dr. PRELINGER. Thank you. Dr. Cavanaugh's example shows something very clearly, but I would like to come back first to what you said about knowing whether an act is right or wrong.

If I remember correctly, the American Law Institute standard says "appreciate." I do not know to what extent a definition of "appreciate" has been established, but it may be different from knowing. Appreciating, to my mind, is a much broader phenomenon than knowing.

Now, I think Dr. Cavanaugh's example teaches us something very important. We do not expect all women who suffer from post partum depression, even severe ones, to go and kill their children. Certain particular ones might do it and have done it, and they have done it because the content of their particular thinking or their particular emotional situation drove them to do it.

Now, I think the situation between psychiatry and the law has become so complicated because psychiatry has evolved and changed in recent decades. Psychiatry these days thinks of human beings not as monolithic, but as conflicted and complex. So, people can want two quite contradictory things at the same time.

It is for this reason of conflict that I think the detailed study of defendants in insanity defenses, quite beyond the affixing of a psychiatric diagnosis, is so terribly important.

It is, of course, possible—and this is for the legal profession to decide—to go and apply a strictly rational standard in terms of the comments that you made, Senator. Did he know at the time that it was right or wrong? If, by some precedent or some legislation, we were to settle that such knowledge should decide the issue, that would be one thing. But it would not be in accordance with what we know today psychiatrically and psychologically about how people function.

People can know something and act differently. People can want to do two things at the same time. If we want to take the insanity defense seriously and want to understand the phenomenon of appreciation of the wrongfulness of an act, we have to study people thoroughly, and then they turn out to be not monolithic.

Senator **Specter**. But, Dr. Prelinger, if you say that they know something and act differently, the law has to deal with whether people are going to be responsible for an act that they did knowingly, even though they acted differently.

Should the law excuse somebody from criminal responsibility for an act of violence where the person knew what they were doing, in your case of the man killing his girlfriend, because they chose to act differently or because they acted differently because of other motivations?

Dr. **Prelinger**. I think, sir, there are perhaps two separate issues because, after all, the American Law Institute standard also has the second clause: Did he have capacity to follow the requirements of the law?

Senator **Specter**. The standard has two branches. We have only dealt with one.

Dr. **Prelinger**. Right.

Senator **Specter**. One is "lacks substantial capacity to conform his conduct to the requirements of the law." I must say that on that standard, I do not know how anybody would know how to apply it because you do not know what the requirements of the law are.

And then there is, "lacks substantial capacity to appreciate the wrongfulness of his conduct." I started on point two dealing with the wrongfulness of his conduct and dealing with "appreciate," and really raising the issue as to whether the use of the word "appreciate" is intended to be different from intent or knowing, and to what extent "appreciate" means something different from intent or knowing.

Dr. **Prelinger**. I believe that it means something different. I am not a lawyer; I do not know what definitions exist of that. But, to my mind, for instance, "appreciation" includes also emotional components.

To come back to the woman who kills her baby in a post partum depression, she may be perfectly well able to say, "I know this is wrong," and yet if you were sitting with her, she might say to you, "But, look, you must also know how terrible the world is. We must do something to spare this baby, and therefore kill it."

So, in this sense she knows what the law requires, but her appreciation is something quite different. She feels that this child has to be killed for its own good, and her appreciation of what has to be done is something quite separate and in conflict with the knowledge. I think this is where psychiatry specifically can contribute; namely, to the elucidation of these conflicts. We have to find ways of mutual understanding of these two separate sets of terms.

INSANITY?

Senator **Specter**. Dr. Rappeport, do you think if a person knows that they are about to kill a child or a lover, it is justifiable to excuse them from criminal conduct?

Dr. **Rappeport**. Excuse me, sir, that they are about to kill the child?

Senator **Specter**. Or the man is about to kill his girlfriend lover.

Dr. Rappeport. I cannot make any comment about Dr. Prelinger's example because I do not think I understand enough of the facts. Ordinarily, a person killing a lover because their love is unrequited or something like that certainly does not warrant an insanity plea.

I do not want to put words in Dr. Cavanaugh's mouth, but having examined on occasion women with severe post partum depressions, I believe he did not adequately convey to the subcommittee the delusional quality of this woman's depression—the generic group of women, not one specific case—in which the depressed woman feels that she is bad, the world is bad, and she cannot allow this beautiful child to go into this cruel world and suffer.

Now, that is then not a full belief that what she is doing is wrong. She may have the basic knowledge that this will be viewed as against the law, but the second part of the *M'Naghten* rule is wrong as applied to oneself.

So, this woman might then very well be considered for an insanity plea. In fact, a very similar case, sir—and I believe my facts are correct—involved the wife of a Congressman from Kansas who, around 1956, murdered one or two of her children in Laurel, Md. Because Maryland used *M'Naghten*, the public, including the prosecutor, was so incensed by the fact that this woman was, in fact, found guilty that they asked the criminal law commission, which I was serving on to come up with a revision. The commission recommended the ALI model penal code test and the Maryland legislature changed the insanity test from *M'Naghten* to ALI.

I have noticed, in reading the Congressional Record and some of the testimony here, that people talk about exonerating a person who thinks he is squeezing a lemon when he chokes someone. I have, in my 25 years of experience, never evaluated anyone who thought they were squeezing a lemon instead of a human being. That is superficial, simplistic, and a totally inaccurate view of mental illness.

I have also not seen anyone who thought they were doing something to a cabbage who was in fact a human being. I think that is also simplistic and does not exist. I do not think psychiatrists have an expertise that allows them to define what the standard should be. This is a social, political decision. We can only furnish our ideas and knowledge.

Incidentally, one of the questions rarely ever asked of a witness testifying in an insanity plea is, "What does the test mean to you?" Nobody ever asks that, plus the facts that the courts, to my knowledge——

Senator Specter. What does the test mean to you, Doctor?

Dr. Rappeport. The ALI test means to me that the key word is "substantial." In fact, in Maryland, we do not have "mental disease or defect." We have "mental disorder," which allows the whole book to come in, the whole SM-3, because that is not important since——

Senator Specter. Well, what does the test mean to you?

Dr. Rappeport. It means that the issue is: Does the patient lack substantial, meaning a whole lot—70, 80 percent, or more—of a capacity to appreciate. That means to me more than just simply "know"—that is a cognitive thing—but some emotional understanding of whether he lacked substantial capacity to appreciate the wrongfulness or criminality of that act, and whether he substantially lacked the capacity to conform his behavior. Was he overwhelmed by an impulse that he could not control—not that he did not control—or was he so driven by a belief, even knowing that this was illegal, that he felt he had to do it?

Senator SPECTER. Your contributions have been so helpful, gentlemen, that we have gone way beyond the time allotted for panel one. Obviously, from the scope of the discussion and the complexity of the issues, we could use a substantial amount of time more, but we really must move on to panel two.

On behalf of the Subcommittee on Criminal Law and the full Committee on the Judiciary, we do thank you, Dr. Cavanaugh, Dr. Rappeport, and Dr. Prelinger, for coming today. If you can provide any additional matters that we have discussed, in terms of statistical bases or cost factors, the committee would be very appreciative.

Dr. CAVANAUGH. Yes, sir.

Senator SPECTER. I would like now to call Dr. Alan Stone, Dr. Loren Roth, Dr. Seymour Halleck, and Dr. Allan Beigel.

We welcome you, gentlemen. Dr. Beigel, you were kind enough to appear at our hearing last week, and I understand that you have requested the opportunity to introduce the doctors. We appreciate your assistance in helping us put together the witnesses today, and the floor is yours.

STATEMENT OF A PANEL CONSISTING OF ALLAN BEIGEL, CHAIRMAN, GOVERNMENT RELATIONS COMMITTEE, AMERICAN PSYCHIATRIC ASSOCIATION; ALAN STONE, PROFESSOR OF LAW AND PSYCHIATRY, HARVARD UNIVERSITY LAW SCHOOL; LOREN ROTH, DIRECTOR OF LAW AND PSYCHIATRY, WESTERN PSYCHIATRIC INSTITUTE AND CLINIC, UNIVERSITY OF PITTSBURGH; AND SEYMOUR HALLECK, PROFESSOR OF PSYCHIATRY, UNIVERSITY OF NORTH CAROLINA

Dr. BEIGEL. Thank you very much, Senator Specter. It is a pleasure to be back today, and the four of us here are appearing on behalf of the American Psychiatric Association. The association has no official position on the insanity defense beyond that which was contained in the release that I provided as part of the record last Thursday.

We do believe, as I indicated then, that the legislature is the proper forum in which, essentially, this legal issue of the insanity defense and its procedures should be discussed, and we are delighted to be here to provide whatever substantive input we can, as psychiatrists, to the Congress of the United States, as to how the issues with which the Congress is concerned should be resolved.

We have, in effect, no special expertise with regard to the legal issues that are involved in the insanity defense and its procedures, but recognizably, because of our participation in those proceedings, we may be in a position to offer some thoughtful input to the Congress as it debates the very complicated legal and moral questions involved with this issue.

To the extent that you have heard and will hear disagreement among us today, it is important, I think, to point out that the major source of that disagreement is not a disagreement about psychiatric issues or even psychiatric diagnoses. In fact, whatever disagreement I think you will hear is that disagreement which reflects the fact that we are all citizens, each of whom has given thoughtful attention to the issues involved in the insanity defense, and might, therefore, obviously differ, as all men may differ, with regard to how such complicated questions should be resolved.

Clearly, there are multiple opinions even now being expressed within the numerous bills that have been introduced in both the Senate and the House. Prior to coming today, I had the opportunity to review the Congressional Record of the past 6 days, and I think I noted at least seven different pieces of legislation that have been introduced, on both the Senate and the House side, and many of them contain significant differences as to how the complicated legal and moral issues are to be approached.

However, each of those bills appears to be trying to address a basic question, and seems to make the assumption—and I just want to state this for clarity—that something needs to be done to reduce the opportunity that an individual has for successfully pleading not guilty by reason of insanity. That, at least from my own particular point of view, seems to be the ultimate question which is being addressed in the legislation that is proposed.

That question, of course, is a necessary predicate question to the question that if there is agreement that that ought to be done by the Congress, representing the citizens of the United States, then what is the best approach to do that.

There were several issues that were raised by the previous panel that I would just like to take this brief opportunity to comment on.

With regard to the matter of dispositional procedures and the recommendations by Dr. Cavanaugh, we certainly would agree with the Senator that there is a need for considerably more data about these innovative and new approaches to dealing with the dispositional problems associated with those people found not guilty by reason of insanity.

The fact of the matter is that the reason data is still relatively preliminary and lacking is that only very few jurisdictions have adopted legislation that, in effect, creates the kind of dispositional proceedings which allow those proceedings and procedures to be measured by data.

Senator SPECTER. Dr. Beigel, we have a relatively limited amount of time here.

Dr. BEIGEL. Surely.

Senator SPECTER. So, what I would like to do is invite the three witnesses to make brief opening statements—the briefer, the better—and then try to get back to the central question as to how we can define insanity in a way which protects society from acts of criminal violence and gives an appropriate safeguard to the individual's rights.

Dr. BEIGEL. May I respond to that one question and then introduce Dr. Stone, Dr. Roth, and Dr. Halleck?

Senator SPECTER. Surely.

Dr. BEIGEL. The third comment I was going to make was relative to that last part of the discussion with the previous panel, which is how to define the insanity standard. I think that is clearly a question that, legislatively, some determination has to be made as to whether changing the definition will, in fact, accomplish what is perhaps the underlying purpose; namely, to reduce the number of people who can successfully plead not guilty by reason of insanity.

From my own personal perspective——

Senator **Specter**. Dr. Beigel, I do not think that the object is stated in those terms, to reduce the number of people who could plead guilty by reason of insanity. The issue is what is the proper balance to protect society and individual rights. What do we learn from the *Hinckley* verdict?

We may disagree with the *Hinckley* verdict, but not want to reduce the number of people who can plead not guilty by reason of insanity. I do not believe that these hearings or the legislative efforts are starting with any preconception, but what we are trying to do is to come to some moral judgments. When we try to come to some moral judgments, because that is what the law is, to establish standards of conduct and balances, then we are looking to the psychiatrists to help us define our terms.

Is it meaningful to talk about intentional, knowing acts, or is there an encroachment on intentional, knowing acts by some other predisposition or mental disease or defect, or the 999 other proliferated terms which come into play?

That is really where we are heading, and to the extent that we can focus on that, the better off we are.

Dr. **Beigel**. Well, let me turn to Dr. Stone, then, who is professor of law and psychiatry in the faculty of law and medicine at Harvard University, and chairman of the American Psychiatric Association Council of Government Policy and Law.

STATEMENT OF DR. ALAN STONE

Senator **Specter**. Welcome, Dr. Stone. Before coming to the central question, your quotation about the clowns is one which I know people want to have a comment about. So, to the extent that we will permit a digression, what did you mean when you said that the Hinckley stage set the parameters for "clowns performing in a three-ring circus?"

I do not know if you would be disappointed if I did not ask the question, but some people might be.

Dr. **Stone**. Well, I made the statement before the *Hinckley* trial. I made it when discussing a panel on the insanity defense a year ago. What I said in its entirety was as follows: That insanity defense trials are like a three-ring circus in which the lawyers are the ringmasters and the psychiatric witnesses are the clowns, and if they are carefully trained, then they will be trained clowns.

Senator **Specter**. Well, with that clarification, we will not move on to the next one. [Laughter.]

Dr. **Stone**. First of all, I want to say that it is a pleasure to be here because it is one of the few times that I have been here that I have been sympathetic to the views of the Senator who is holding the hearing. I find most of the things you have suggested reasonable, and I would like to emphasize that there are two issues.

One issue is, does the insanity defense serve justice, and then there is the related issue, and very importantly related, of what happens to people who are found not guilty by reason of insanity.

Now, we are at a watershed point in the insanity defense in the United States. The shooting of President Reagan and the others highlights that. But we were in trouble already. I think I am somewhat uncomfortable with the notion that psychiatrists were reassuring you that we do not have to worry about what happens to people found not guilty by reason of insanity.

I do not find Steadman's statistics reassuring. There are other statistics, for example, in Michigan. Half the people who were found not guilty by reason of insanity did not remain in confinement more than 3 months; that is a result of legal decisions which have held that persons found not guilty by reason of insanity are, in fact, not guilty. Therefore, if they are to be retained, they are to be civilly committed.

Now, it is my view that it is morally justifiable to treat people who are not guilty by reason of insanity of a violent crime different than other people. It is morally justifiable to treat a schizophrenic who kills someone differently than a schizophrenic who does not kill someone.

Our current law does not allow for that distinction, nor can we psychiatrists guarantee to you who are worried about these issues—the Senate and the public—that we can promise you that people found not guilty by reason of insanity, under the current system of civil commitment, will, in fact, be locked up and that the community will, in fact, be safe.

My feeling is that if Mr. Hinckley is retained in confinement, it will not be because the judge has carefully weighed the criteria of the District of Columbia statutes, but will respond to political pressures now and in the future.

The real problem that we have in psychiatry now and which creates this problem——

Senator SPECTER. Dr. Stone, let me pause on that point for just a moment.

Dr. STONE. Yes, sir.

Senator SPECTER. If you think it appropriate to treat John Hinckley differently because of the act that he has committed, contrasted with whether he was there on a civil commitment, would you think it appropriate to keep him there for 20 years or life?

Dr. STONE. For some substantial period of time which the legislature thought appropriate, yes. Now, let me emphasize what is at stake here. I am telling you that we do not have the means, as a result of the law and as a result of our own psychiatric techniques, to guarantee society that we can protect them should someone like Hinckley be released. That just has to be said up front, and anything you do in legislating in this area has to take that into account.

Senator SPECTER. Well, we can understand that, but are you saying that if you had a third category—assume it is a murder case; murder can have a death penalty or life imprisonment. Would you think it appropriate, on a finding of not guilty by reason of insanity, to punish by a term of 20 years?

Dr. **Stone**. Well, you want to call it punish, and now we may be getting into complicated conceptual and moral issues.

Senator **Specter**. All right. Strike punish and insert imprison or detain.

Dr. **Stone**. I feel that if somebody is a kleptomaniac and steals a lot of money, we may not want to punish them, but we certainly would want them to repay the money. When somebody commits acts of violence, they cannot repay society in the same way, and I think there is an obligation to society even if you were mentally ill at the time you shot people.

Senator **Specter**. Well, the standard might be to keep John Hinckley in detention as long as he is a danger to society or to himself. This would be a different standard than keeping him in detention with a view to the fact that he has committed these acts of violence, although he was declared insane at the time.

Dr. **Stone**. Exactly. The standard of dangerousness rests on quicksand. We cannot make that standard into something objective which would allow a court to rationally make a determination.

Senator **Specter**. Well, Dr. Stone, if it rests on quicksand, it rests on nothing.

Dr. **Stone**. The other standard?

Senator **Specter**. Well, if the standard of detention so long as the individual is not a menace to society rests on quicksand, we cannot give it any basis at all, because you sink in quicksand.

Dr. **Stone**. That is my view. Therefore, you cannot expect using that standard will protect society. You will confine people who do not need to be confined; you will let out people who need to be confined.

Senator **Specter**. Then how do you decide, just keep everybody in, let everybody out, or flip coins?

Dr. **Stone**. I think in the case of not guilty by reason of insanity, where I have said I believe that it is morally justified for society to treat such people differently and to deal with them differently, we can keep them in confinement for a specified length of time.

Senator **Specter**. So, you would have the confinement the same, but have the treatment different or the circumstances different. If there is a finding of not guilty by reason of insanity, the consequences could be that the same period of detention would apply, but it would be with treatment as opposed to simply incarceration?

Dr. **Stone**. Yes. I think the crucial thing that I want to get across to you is that 20 years ago, someone like this would have been destined to remain the rest of their lives in a mental hospital, and this kind of hearing would have been really sort of a moral hypocrisy. Essentially, the person would have been confined in a prison or confined in a mental hospital for the rest of their lives.

Now, as a result of various legal decisions which have nothing to do with psychiatry, but which have to do with arguments about the rights of the mentally ill and about the constitutional protection of defendants, we are now in this kind of situation which is complicated by the fact that psychiatrists now treat people briefly in hospitals and then discharge them.

A patient with a diagnosis of schizophrenia 20 years ago would remain in a hospital for 13 years. Now, he may remain in a hospital for 13 days or a few weeks, or a few months at the most. So, there is nothing in psychiatry or the law to offer the kind of protection that there was 20 years ago, and that then forces us, as you are doing, to reconsider the insanity defense when that is the outcome of it. So, I think these hearings are quite appropriate.

Now, I would like to say just one more point about the question you were asking the first panel; I perhaps have gone on too long already.

Let me say that I think I, as a psychiatrist, believe that I do not have an answer to the ALI question. I believe that I, as a psychiatrist, can offer medical and psychiatric understanding of the person's mental condition. To understand and respond to the ALI test, one has to have some notion of free will and how people behave, and have woven that together with your psychiatric theories. I do not think we have that.

I think what we tend to do—and I think we have made this mistake in the past, as Dr. Prelinger pointed out—is we have assumed that if somebody was psychotic and had a very serious mental illness, then we assumed that they did not appreciate or could not conform.

I think that is the same mistake that the jury made in their deliberations. They confused whether this person was sick, with whether this person was criminally responsible.

Senator SPECTER. You think there is no necessary relationship?

Dr. STONE. I think they are questions which come from two different languages. It is very hard to put them together. I do not think that the psychiatrist, when he goes into the other language, does it as a psychiatrist.

Senator SPECTER. How would you define criminal insanity?

Dr. STONE. My view of it is that that is for the legislature to decide.

Senator SPECTER. Suppose you had the misfortune to be elected to the U.S. Senate. [Laughter.]

Senator Heflin and I consider it good fortune, but judging from your comments, you may not. But suppose you had the legislative responsibility. How would you define it?

Dr. STONE. Well, I understand that this is what is first on your agenda. I personally think it is much more important for you to look at the legislation about what happens to people after they are found not guilty by reason of insanity.

Senator SPECTER. First things first, Doctor.

Dr. STONE. Well, I think that is the first thing, but I can suggest a number of possibilities to you. I personally think that the word "substantial" is one of those words that is highly problematic, especially when it is "substantial" plus "the burden is on the prosecution."

Senator SPECTER. You know what it would not be. What would it be?

Dr. STONE. I make this not as a my perfect solution; I just bring this to you as a consideration. One could simply alter the ALI by changing two words. "A person is not responsible for criminal conduct if at the time of such conduct, as a result of severe"—I have added "severe"—"mental disease or defect, he lacks entirely the capacity either to appreciate," et cetera.

So, all I have done is put in "severe" and say "lacks entirely." Now, it seems to me that that comes close to what you have been reaching for, Senator, although I think you want to move in the direction of totally different language. I think what I have done captures the sentiments you have been expressing, if not the exact words.

Senator SPECTER. Well, that is very interesting and very helpful, Dr. Stone; thank you.

Let us turn at this time to Dr. Loren Roth, who is the director of law and psychiatry at Western Psychiatric Institute and Clinic from the University of Pittsburgh in Pittsburgh, Pa. Welcome, Dr. Roth.

STATEMENT OF DR. LOREN ROTH

Dr. ROTH. Thank you very much, Senator. I appreciate the opportunity to speak before you and your committee today on a topic that is very important and one that historically has included much controversy.

First I want to say that there is no official APA position on the insanity defense. APA has instead issued a statement that I have submitted for the record. So, my comments today represent, in part, some of my own opinions. I should also say that most of my opinions are very congruent with those that Dr. Stone just articulated. I will therefore make some of the same remarks, perhaps in different format, and then add some others.

I should say that in 1974, I was the author of the American Psychiatric Association task force report on dangerousness and violence.[1] There have been uniform and continuous findings to this day—work done by Dr. Steadman and others—that psychiatrists lack the ability to predict a person's dangerousness to others over the long term.[2]

Over the short term, in the context of an emergency hospitalization for treatment's sake, when, for example, we are considering hospitalizing a patient for a matter of days to weeks to provide treatment and recent violence has occurred, we can make such judgments because they are made in the context of a therapeutic judgment.

There is no evidence that psychiatrists, psychologists, parole officials or anyone else can make reliable or valid judgments about a person's future dangerousness, apart from relying upon the person's previous criminal record. There is some suggestive data, of course, that the more previous violence a person has committed and the younger his age the more recent his violence was, then on a statistical basis future violence will be forthcoming. But that is a judgment for the layman; it requires no psychiatric expertise.

Now, in the limited time that I have before me, I want to make five major points, and I will make them rather briefly and then you can choose whether or not you wish me to amplify them.

---

[1] Clinical Aspects of the Violent Individual. Task force report 8, American Psychiatric Association, July 1974, pp. 23-33.

[2] Cocozza J, and Steadman H: The Failure of Psychiatric Predictions of dangerousness: Clear and Convincing Evidence. Rutgers Law Review 29: 1084-1101, 1976.

First, in my readings over the last week I have noted that there has been an occasional suggestion that we should have a "psychiatric tribunal." Rather than an adversary system, we should have one set of psychiatrists who work for the court and deliver themselves of an opinion. I would very much caution you not to go in that direction. That would be a bad mistake.

American law is predicated on a clash of adversary opinion, and this type of procedure would lead to a false conformity.

Senator SPECTER. Dr. Roth, I do not think you have to amplify that point.

Dr. ROTH. Fine.

Senator SPECTER. I do not think there is any sentiment for that.

Dr. ROTH. Great.

Second, while there may be some need to retain the insanity defense in some form, it should not be psychiatry's role to state exactly what that form and shape should be. The legal standard must be shaped by the legislature, taking into account the social policy considerations that are relevant.

Senator SPECTER. We agree. We shall not delegate that responsibility to the American Psychiatric Association.

Dr. ROTH. Very good.

I should say that psychiatrists do believe that persons differ in their degree of behavior controls. Our profession is founded on that notion. Obviously, our willingness to commit certain patients to the hospital involuntary and our willingness to intervene is predicated on our notion that a patient with catatonic schizophrenia has a different degree of control over his behavior, certainly in the great majority of instances, than someone who has a problem of living. In other words, there is a continuum of behavior controls.

Third—and this, Senators, is my most important point, so I want to be certain to make this point because it is my critical point—it is my strong belief that the law should not ask psychiatrists questions they cannot answer.

The various legal standards which you have articulated, Senator, in my judgment have no psychiatric meaning whatsoever. They are legal——

Senator SPECTER. The law should not ask psychiatrists questions which they cannot answer?

Dr. ROTH. Which they cannot answer.

Senator SPECTER. How about a Senate committee? [Laughter.]

Dr. ROTH. Excuse me?

Senator SPECTER. There is a rule in the law, never ask a question to which you do not know the answer.

Dr. ROTH. Right.

Senator SPECTER. Lawyers get into problems with that, but how can we guarantee in advance that you will not be asked a question that you cannot answer?

Dr. ROTH. There is a simple answer to that, fortunately for me.

Senator SPECTER. Tell me.

Dr. ROTH. Judge Bazelon articulated that answer in the *Washington* case many years ago. I would commend the committee to read the *Brawner* opinion[3] and to read the "Previous Washington" instructions,[4] in which Judge Bazelon was quite clear that it is not the role of psychiatry to translate medical concepts into legal constructs because, in fact, it is my opinion—and I think this was Judge Bazelon's opinion—that there are no experts in criminal insanity, save the jury.

---

[3] *U.S.* v. *Brawner* 471 F2d 969 (D.C. Cir. 1972), (Bazelon D. concurring).

The question that the jury is being asked is a social and a moral question, in light of the medical facts provided. Inevitably, by asking psychiatrists to translate these terms, it is bad for the public, bad for the law, and bad for psychiatry.

Senator SPECTER. So, psychiatrists should not testify as to the ultimate question of legal insanity?

Dr. ROTH. I am absolutely clear about this. This is a great mistake.

Senator SPECTER. That is the third part of the bill that I introduced last week.

Dr. ROTH. I realize that, and I support it as an individual.

Senator SPECTER. Then what questions may we ask you? May we ask you what questions we may ask you?

Dr. ROTH. You certainly may. [Laughter.]

You may ask us to do a medical job. You may ask us to act as if this were our patient or a person who is undergoing a psychiatric assessment. Our job will inevitably be compounded by the fact that we are working retrospectively, as has been pointed out. This fact alone will decrease the reliability, validity, and credibility of our testimony, particularly if we do not have access to the relevant data.

So, to begin with, our testimony has to be somewhat discounted from this perspective. After we examine defendants, we should, to the best of our ability, much as if they were patients, try to understand the nature of their illness at that time, what diagnosis they had, what their psychodynamics were, what they were thinking, why they were thinking this.

Senator SPECTER. How can you answer those kinds of questions—what they were thinking and why they were thinking it?

Dr. ROTH. Well, I said we can do it but not with perfect reliability. I started my remarks here with the idea that, retrospectively, we frequently do not know. A good forensic psychiatrist, I should say, does use medical records, does talk with the defendant's family, for example, and does accumulate other data.

A certain, shall we say, hypothesis or reconstruction of the way the defendant was thinking then is possible within medical terms, with not perfect reliability, and juries should be told that, certainly. And we can speculate about the reasons why the act was committed.

To pick up Dr. Cavanaugh's example, which I think was a good one, many of us have seen such cases, and I want to reinforce Dr. Rappeport's point. Such a person who kills her baby might be quite delusional. She might have a view that the baby is the devil and that it is her role to kill the devil.

Senator SPECTER. That being so, would she know what she was doing?

Dr. ROTH. She might know that she was killing the baby, but——

---

[4] *Washington* v. *U.S.* 390 F2d 444 (D.C. Cir. 1967).

Senator SPECTER. But she would think she was killing the devil?

Dr. ROTH. Right.

Senator SPECTER. I may have violated the rule there.

Dr. ROTH. No.

[Laughter.]

Senator HEFLIN. Well, that calls for a conclusion.

Dr. ROTH. Right.

Senator HEFLIN. I do not mean to interrupt this.

Senator SPECTER. That is OK.

Senator HEFLIN. You are asking to put psychiatry into a field of expertise that no other field of expertise is in the judicial system—the expression of conclusions.

Dr. ROTH. No, I am not. I am asking not to——

Senator HEFLIN. You are asking to separate them.

Dr. ROTH. I want to be very clear about what I am asking. I am asking that when psychiatrists are asked, "Doctor, do you, in your medical opinion, believe that this defendant had substantial capacity or lacked substantial capacity to appreciate the wrongfulness of his act or to conform his conduct to the requirements of law," those questions are what scientists or philosophers would call "illegal questions." They constitute category mistakes.

The psychiatrist is being asked to take a pack of oranges and tell you how many apples they constitute, since there is no way to translate those medical terms into terms that the law or the jurors would understand. So, it is not credible testimony, in my view, for psychiatrists to testify as to legal conclusions.

Now, the practical result of what I am suggesting is a bit revolutionary, I should say, because we do not have a lot of experience in this area. California is now attempting, apparently, to restrict expert testimony in this way.

The central problem is, if testimony were restricted this way, the jury would be forced to struggle with the moral issues of guilt, responsibility and innocence without being able to blame their decision on the psychiatrists or to say, "Well, I did not know what was going on because one psychiatrist said he was sane and the other said he was insane. Therefore, we were confused."

Senator SPECTER. Let us pursue this question about the child and the devil, and knowing.

Dr. ROTH. The child and the what?

Senator SPECTER. The woman who kills her child, thinking that she is killing the devil.

Dr. ROTH. Right.

Senator SPECTER. That suggests to me that she does not know she is killing her child, and that would take it outside of a knowing and an intentional act.

Dr. ROTH. Yes.

Senator SPECTER. And it would be morally justifiable under our traditional concepts of the law not to attach criminal responsibility to that conduct of the mother.

Dr. ROTH. Right.

Senator SPECTER. But that says that she does not really know what she is doing.

Dr. ROTH. Well, I am glad, Senator, you have asked me this question, and this, to me, is another critical point. A scholar named

Abraham S. Goldstein, wrote a book in 1967[5] which I would very much commend to you, which suggests that there really——

Senator **Specter**. I have got a couple of his books. The Yale law professor?

Dr. **Roth**. He is a Yale law professor; he was the dean of the Yale Law School.

Senator Specter, there is no difference between the various legal standards. Now, most legal scholars believe—for example, Mr. Goldstein was opposed to the ALI formulation, believing that all testimony which can be introduced under ALI can also be introduced under *M'Naghten*, and that as a practical matter it does not matter. I think this is the experience of most forensic psychiatrists.

No one believes that juries are paying strict and necessarily completely understanding attention to the exact legal formulation. It is not the legal niceties of the test.

Senator **Specter**. How about the burden of proof question, Dr. Roth? Do you think that it makes a difference who has the burden of proof?

Dr. **Roth**. I think it does make a difference who has the burden of proof. I think that putting the burden of proof on the State or on the defendant will affect the numbers of persons who are found not guilty by reason of insanity.

Senator **Specter**. Do you have any problem with putting the burden of proof on the defense?

Dr. **Roth**. I have no opinion on that for a particular reason. We might talk about the standard of proof if you wish, but the burden of proof is fundamentally a societal and legislative decision. I do not believe that a psychiatrist—here I am speaking on behalf of the American Psychiatric Association, our group has discussed this previously. We do not have an opinion on the burden of proof, because the burden of proof is a societal-legislative judgment.

When it comes to the standard of proof, we can say that it is difficult to establish psychiatric concepts or diagnoses beyond a reasonable doubt. In the various legal briefs which my profession has written and which I have helped author, we have opted for standards such as "clear and convincing" or intermediary standards, because if you put the onus upon psychiatry to establish things "beyond a reasonable doubt," we will not be credible.

Let me just cover my last——

Senator **Heflin**. I am going to have to leave. I have had some real problems between hearings, and I reckon we are like a 100-ring circus; we are due to be at every ring to see what is going on all the time. But, Mr. Chairman, I do have some questions that I would like to ask.

I think your feeling of not complying with Harry Truman's "the buck stops here" is a question where, while you do not express an opinion, you separate yourself from all other expert witnesses. You are supposed to have some expertise, and the concept of expert witnesses is on the basis that you ask them questions that are invasive of the province of the jury or the ultimate issue of the jury.

---

[5] Goldstein A. S.: The Insanity Defense. New Haven, Yale University Press, 1967.

But the idea is that your expertise is supposed to aid the jury in an adversarial position where you have people of different positions. I think if the field of psychiatry wants to get out of that, they are seeking to shirk their responsibility as an expert witness. I think that is my opinion and my observation in that regard.

Dr. ROTH. Yes, sir.

Senator HEFLIN. I know doctors do not like to testify as to the ultimate issue in regard to malpractice about another physician. If you have ever tried any of those cases, you know you have to pull it out of them.

I think if you are in the field and you are an expert in the field, that is an obligation I think you have to have.

Dr. ROTH. Let me clarify that. First of all, I have not said that we do not wish to testify as experts. We wish to testify as medical experts about medical, psychiatric or psychological matters. We cannot extend our expertise to an area of conclusions that are not medical conclusions, but are legal conclusions.

Now, I do not have enough experience as an expert witness; I certainly do not know anything about economics and all of these other areas to the extent to which expert witnesses do that. So, I cannot fully answer your question there.

I do believe that expert witnesses are not supposed to talk about proximate cause in the law, which is ultimately a legal notion. What we are talking about here is proximate cause or legal causation.

When Dr. Cavanaugh presents his information, he is really telling you, "Well, we believe that the cause of this person's behavior was the mental illness." Now, as long as we keep it within our terms, that is OK to me. But when we get into the legal causation notion, I think we are usurping the function of the jury.

Senator HEFLIN. Well, then that is a defect in the language of legal causation, and maybe the standard ought to be, in effect, in keeping with the state of the art.

Dr. ROTH. Well, that is another approach that could be taken. I should say again that I think legal scholars feel—and I think Rita Simon did some studies on this—that it is not the standard or the instructions to the jury which always predicates the nature of jury decisionmaking.[6]

I believe that the idea to infinitely refine the standard, while satisfying to us as rational types who want neat categories, does not necessarily come to the final solution.

Senator HEFLIN. Well, I have got a time limitation, and you and I can discuss this, and this gets not into a psychiatry field, but the relation of expert witnesses and psychiatrists as expert witnesses. We are not going to do much changing of that; that is going to be done by the legal system.

I want to go into this question of guilty but insane.

Dr. ROTH. Fine.

Senator HEFLIN. I need some light shed from experts on this. There have been some suggestions of a new verdict of "guilty but insane." Some suggestions have been that it be a replacement for not guilty by reason of insanity. Some suggestions have been that it be an additional verdict.

---

[6] Pasewark R. A.: Insanity plea: a review of the research literature. The Journal of Psychiatry and Law 9 (4) : 357–395, winter 1981.

I would like to have thoughts from you and the rest of the panelists on the issue of a new verdict or of a replacement to the overall concept in regard to the matter pertaining to a possible verdict of guilty but insane.

Dr. ROTH. Well, this was my next point and I had written down here that the next point was going to be——

Senator HEFLIN. If you can be brief and succinct.

Dr. ROTH. Fine. I think that the motion "guilty but insane" is a contradiction in terms. If one wishes to put forward this concept, please try to call it "guilty but mentally ill." My notion is that insanity, which is a legal concept, in some sense precludes guilt.

So, to begin with, we could clean up the language to call this "guilty but mentally ill."

Senator HEFLIN. Well, there is some question of whether the word "guilty" ought to be used there. There is some thinking at least in my mind as to whether or not you want to use something like "indictment proven, but mentally ill." Of course, that is a societal judgment on whether the words "guilty" or "not guilty" ought to be used.

Dr. ROTH. I have testified in favor of a "guilty but mentally ill" bill in the State of Pennsylvania, which is presently being proposed by Senator Fisher. I think that there are some aspects of the concept that are sound. In fact, I do not think that Dr. Stone's proposal really is anything different if a determinant amount of sentence or time served is going to be effectively given. The pragmatic effect would be that of guilty but mentally ill, in effect, to have a certain amount of treatment.

The problem for psychiatry is this: The guilty but mentally ill verdict can too easily become a sham and a way of rationalizing guilt without providing treatment for mental disorders within prisons. I was formerly a prison physician, Senator. I worked for 2 years as the prison doctor at Lewisburg, Pa., and I have been very much associated with prisons and jails for 10 or 12 years.

There is very little psychiatric treatment in jails and prisons.[7] Jails and prisons do not want psychiatric patients in prisons, since they are disruptive of the environment and cause all kinds of havoc. Very creative thinking will have to be done as to how these guilty but mentally ill people will subsequently receive genuine psychiatric treatment for their conditions.

My view would be that if you failed to provide such treatment, it would be some kind of violation, you know, of substantive or procedural due process. That is your area, but I think to promise that and not deliver it, which would be my prediction of what will happen would be wrong.

Senator, I just want to make one final comment and I am done. There are studies, Senator Specter, of the type that you were looking for about what happens to people formerly released. I have some of them here. [See appendix A.] There have been a few follow-up studies. [See also footnote 6.]

---

[7] Roth, L. H.: Correctional Psychiatry, chapter 28, in Modern Legal Medicine, Psychiatry and Forensic Science, pp. 677-719. Curran W., Peety C., McGarry A. L. (eds.). Philadelphia, F. A. Davis, 1980.

Henry Steadman has an unpublished study which I brought with me. It is going to appear in the American Journal of Psychiatry this month, following up some 50 subjects who were released in New York. His finding was—he only had 33 patients finally released—15 percent, all of whom were males, had post-hospital arrests. This is a period over a couple of years. A previous study showed 25 percent.

There are about two or three studies which show that anywhere from 15 to 35 percent of people found not guilty by reason of insanity are rearrested. Now, unfortunately, I do not have data—and it is not present in these papers—about how many severe crimes they committed. In Steadman's statistics, of those 15 who recommitted offenses, there were three assaults and some other kinds of things.

The main point I want to make simply is that there are empirical data, and Henry Steadman, a sociologist from New York, has them.

[Letter submitted by Dr. Roth to Senator Specter follows:]

APPENDIX A

University of Pittsburgh

WESTERN PSYCHIATRIC INSTITUTE AND CLINIC
Department of Psychiatry, University of Pittsburgh School of Medicine
Law & Psychiatry Program

July 7, 1982

Hon. Arlen Specter, Senator
United States Senate
342 Russel Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

It was a pleasure for me to represent the American Psychiatric Association and to testify before your senate subcommittee on the subject of the insanity defense. As I hope the testimony indicated, there are no easy solutions to the vexing problems of the insanity defense. But we believe you are progressing in the right direction.

At the Senate Hearing I indicated that a few empirical studies were available about the operation of the insanity defense, studies which you and your committee may find useful for your continuing work. Unfortunately, there have been few systematic followups performed concerning post discharge outcomes for persons found Not Guilty by Reason of Insanity (NGRI), i.e., information about subsequent criminal recidivism of these persons. Enclosed are copies of the few studies that are available including a very recent study (July, 1982) in the American Journal of Psychiatry by Pasewark et al., entitled "Detention and Rearrest Rates of Persons Found Not Guilty by Reason of Insanity and Convicted Felons." See also an earlier 1966 study by Morrow and Peterson, also a study by Greenland in 1979. These studies found somewhat similar results with between 20 and 37% of discharged persons having been rearrested after release to the community. See Steadman et al.'s In Press paper "Factors Associated With A Successful Insanity Plea." (Enclosed.)

As found by Pasewark et al., post release arrests for these persons were for less serious charges than were the offenses that led to the plea of insanity (see Table 4, p.895 in this article). Longer term followup than was able to be performed in this and other studies is, however, I believe,required in order to more reliably establish recidivism rates.

3811 O'HARA STREET, PITTSBURGH, PA 15261 (412) 624-2161

Pasewark et al. found that men who had been released subsequent to an NGRI finding were hospitalized for 533 days versus 837 days spent in prison for a matched group of convicted felons. The actual length of hospitalization for the entire NGRI cohort would, of course, be longer since, as noted by Pasewark et al., 23.8% of the acquitted men were still hospitalized when the study was terminated.

Another interesting study is by Criss and Racine, 1980, from the Bulletin of the American Academy of Psychiatry and the Law. This study, detailing the Michigan experience with NGRI found that subsequent to the McQuillan case (a case granting equal protection for insanity acquitees) that a high percentage, 55.6% of NGRI's were discharged following a 60 day diagnostic commitment. Alan Stone, M.D. mentioned this finding at your hearing. It is troubling.

The empirical studies thus suggest that there is a subgroup of NGRI offenders who are quickly released from hospitalization, following a finding of NGRI. However, the majority of such persons stay for a longer period of time, involving at least a few years. Some released NGRI offenders are rearrested. A very few (at least as periodically described in the newspapers) commit spectacular crimes. Obviously there is considerable need for more adequate data concerning the eventual outcomes of a large number of released NGRI persons followed for significant periods of time.

In general, it is also the experience of researchers and other persons knowledgeable about these matters, that it is the NGRI person's criminal record (including both the frequency and the severity of his/her offenses - rather than his/her mental status) that is the best predictor of how such persons do following release. See my enclosed chapter on Correctional Psychiatry. Henry Steadman will be able to give you far more information on this topic. He has done considerable work about predictors for future antisocial behavior.

Also enclosed is another paper by Steadman, Monahan and others entitled "Mentally Disordered Offenders: A National Survey of Patients and Facilities," (In Press) in Law and Human Behavior. This is the most recent authoritative document concerning the numbers of persons admitted across the country to hospitals subsequent to NGRI determination. A great deal of misinformation has recently been bandied about concerning this subject. Steadman and Monahan's survey found that 1625 persons were admitted nationwide in 1978 to U.S. facilities as Not Guilty by Reason of Insanity. These figures, when considered in conjunction with the daily census of such facilities suggest that the average NGRI offender spends about 2 years inhospital, i.e., 23.2 months for NGRI's (see p.4, enclosed paper).

Henry Steadman's address is:

Henry J. Steadman, Ph.D.
Director
New York State Dept. of Mental Hygiene
Mental Health Research Unit
44 Holland Avenue
Albany, NY 12208
Tel.#518-474-2121

I suggest two other persons as excellent resources whom you might contact concerning empirical information about the insanity defense. These persons also have a very good understanding of the historical, academic, political, and conceptual problems posed by the insanity defense, matters which should, I believe, be considered in any reformulation of the law. They are:

John Monahan, Ph.D.
Professor of Law
University of Virginia
Charlottesville, VA 22901
Tel.#804-924-3632

Saleem Shah, Ph.D.
Chief
Center for Studies of Crime & Delinquency
National Institute of Mental Health
Rm. 7-103
5600 Fishers Lane
Rockville, Maryland 20857
Tel.#301-443-3728

In my judgment, Dr. Shah at NIMH is the person with the most sound understanding of the political and social policy implications of the insanity defense. Dr. Shah also has some instructive ideas about the role mental health professionals (including psychiatrists and psychologists) should play within the framework of criminal insanity trials. I have enclosed a copy of Dr. Shah's paper from the Catholic University of America Law Review (1974) (see especially pp. 681 - 685). Dr. Shah's program at NIMH has been responsible for sponsoring much of the most useful empirical research in law and mental health that has been performed over the last 10-15 years.

Finally, I have included a few papers of my own relating to these subjects, particularly to problems arising in the area of correctional psychiatry when treating felons or mental patients. The problems that psychiatrists and others have when attempting to predict future dangerousness are described and documented in our 1974 APA Task Force Report on Violence (enclosed).

Dr. Paul Appelbaum and I (in an enclosed (In Press) paper in the Archives of General Psychiatry) also discuss conceptual, pragmatic, and other policy considerations which arise when psychiatrists assess a person's mental state to help determine his/her competency to make treatment or research decisions. The conceptual issues that arise in this arena are no different than for criminal insanity. Setting the standard for criminal insanity is a societal judgment, not a psychiatric one. The standard set should be a function of the outcomes desired.

Good luck in your future deliberations. I shall follow the work of your senate subcommittee with interest. Please feel free to call upon me, or others at the APA, if you desire additional help.

Sincerely,

Loren H Roth M.D.

Loren H. Roth, M.D., M.P.H.
Professor of Psychiatry
Director
Law and Psychiatry Program, WPIC
Chairperson
APA Commission on Judicial Action

LHR:bb

cc: Jay Cutler, J.D. - APA
Melvin Sabshin, M.D. - APA

Dr. **Beigel**. I would just like to perhaps ask if we could give Dr. Halleck a chance to make his statement, and then come back.

Senator **Heflin**. My problem is, I have got to be somewhere.

Dr. **Beigel**. Maybe Dr. Halleck would like to respond, then, to the specific question.

Senator **Heflin**. All right.

Dr. **Beigel**. I, myself, Senator, would endorse what both Dr. Roth and Dr. Stone have indicated, that the real issue is a dispositional issue, and I do not know that "guilty but mentally ill" is the proper way to address that question. I think that is a more indirect way, and the direct way is to retain the distinction between not guilty by reason of insanity and guilty, and then to determine in a more appropriate way how we can deal with those people who are found not guilty by reason of insanity.

Senator **Heflin**. Well, you have a situation, I suppose, where there is gray matter, and differences of opinion and things of this sort, in regard to it. In your American Psychiatric statement, you said, "We are put in a real bind to call 'yes' or 'no'." A jury is put in that bind.

We had a witness here who said, "The form had 'guilty' and other things. We were hunting something in between." I would assume that there is a classification that falls in between which would, in effect, direct treatment.

Now, when we get into the treatment phase and the punishment phase, it would have to have a correlation and, in effect, a direction.

Dr. **Halleck**. Senator, before you leave, could I comment on one of the things you were saying about the psychiatrist trying to abdicate responsibility as an expert?

Senator **Specter**. Dr. Halleck, before you do, we want to thank you especially for coming. We thank everyone, but you especially. You came from North Carolina last night, and flew up when we had a cancellation, unexpectedly, on the second panel. So, we want to express our special appreciation to you for being here.

Dr. **Halleck**. Thank you.

The point I wanted to make was, if I testify in a malpractice case, I am quite willing to say that the doctor was negligent and that the patient was damaged, and I can do that on the basis of some data or some medical evidence.

The point Dr. Roth was making, which I will make, I hope, in the same way in a moment, is that when you testify to the conclusory standards of the insanity defense, you do not have that background of data or expertise. We may be the only experts who are asked to testify to a conclusory question which really, in effect, determines the ultimate guilt or innocence of the defendant.

Senator **Heflin**. Well, in an adversarial situation, you have got one on one side and one on the other, and then it is a jury determination.

I have tried a good number of cases, and seen a jury with no evidence of the fact, or no statement of the fact. And then you are saying you are transferring that for their determination. I realize it is a societal as well as an evidentiary matter, but the concept of expert witnesses and reaching a conclusion has been a carefully thought-out situation over a number of years.

It is a tough place to be; I wish I did not have to vote on a lot of hot issues. I think you are letting your personal idea of, "I do not want to get to that issue," influence you. I do not know. You may not. It may well be, as was pointed out, that the standards and the language are not keeping with the state of the art, and maybe the language needs to be changed.

Dr. **Stone**. Senator, before you leave, I would just like to say a word of discouragement about the guilty but mentally ill verdict. Now, I do not say this as a psychiatrist, per se. I say it as someone who teaches law and psychiatry at Harvard Law School.

I think that there is a difficult moral question of whether we should hold this person responsible or not. That is a difficult place for a juror to be, but I think they should be in that place. And I am very troubled about giving them the option of guilty but mentally ill. I just think that is avoiding what we want the jury to do—to come to some determination about moral responsibility or not. That just gives them an easy way to avoid that difficult question. So, I personally am unhappy about that.

Senator **Specter**. Dr. Halleck, let us hear greater detail from you, if we may. We are very much interested in your views and, as I say, we are appreciative for your coming, especially under such difficult circumstances.

STATEMENT OF DR. SEYMOUR HALLECK

Dr. **Halleck**. Well, thank you. I appreciate the opportunity to be here.

First, given the philosophy and structure of our current system of criminal justice, I believe the insanity defense has some usefulness to our society. Let me not repeat some of the reasons other people have given for why it might be useful, but let me add one that has not been given.

It is possible that the insanity defense serves to keep the role of psychiatry in the criminal trial more manageable. If there were no insanity defense, attorneys would understandably expand their efforts to use psychiatric testimony in other phases of the criminal trial.

If the defense were abolished, we might see efforts to use psychiatrists to find more defendants incompetent to stand trial, to negate the mental element in specific-intent crimes, and to argue that mental illness should mitigate the harshness of punishment.

My point here is simply that the criminal justice system is an extraordinarily complicated one and if you make a major shift in any element of it, it usually reverberates throughout the system.

Senator **Specter**. Dr. Halleck, would you expand on point two that psychiatric evidence might be used to negate the mental element of mens rea intent?

Senator Thurmond and Senator Hatch have proposed that the defense of mental illness or insanity be sharply limited solely to negating mens rea, which would, in effect, eliminate the insanity defense and then simply make it a part of the determination of knowledge or intent. What is your view of that sort of a legislative change?

Dr. HALLECK. Well, currently intent is defined as awareness of conduct and its consequences and the circumstances under which it takes place. There was a time when intent meant motivation, or it meant evil, and I do not think it is impossible that the courts might eventually come to a broadened view of intent.

Certainly, I think ambitious defense attorneys will work very diligently to broaden that definition of mens rea if the insanity defense is not there. These kinds of things have happened in California, as you know, with the diminished capacity defense, which by the way no longer exists in California. But I think that scenario is not unlikely.

Senator HEFLIN. Let me ask you this while you are on mens rea. As I understand it, a state of mind is required as an element of the offense charged. In the crime of murder, usually included within an indictment—and this may vary with the jurisdiction—you would have an issue where, in first degree murder, there is usually the element of premeditation. What separates second degree from manslaughter is malice. We will take those two instances.

Under the mens rea test, the person might lack a state of mind, because of a mental illness or disease, to formulate the necessary premeditation, which would then mean that he might be guilty of second degree murder as opposed to first degree murder.

The state of mind in regard to malice could be, under the mens rea defense test, he had premeditation, but he did not have the mental capacity to form the malice. Therefore, he would not be guilty of first degree murder or second degree murder, but he would be guilty of manslaughter.

Are we, under the mens rea concept, opening up areas in which you could have many of the elements, even getting it more confused in regard to a jury?

Dr. HALLECK. That is exactly my point, sir, and that is what happened in California, where eventually it was possible to reduce a crime to voluntary manslaughter by redefining the elements necessary for first and second degree murder. The courts were very creative in doing that, and there was much more psychiatric testimony, which some people might have approved of, but which I think was in many ways not manageable. At least the insanity defense makes psychiatric testimony somewhat manageable.

Senator SPECTER. We are going to have to conclude in the course of the next several minutes by about 12:15, and I would like to come back to the question which we posed to the first panel, which at least I consider to be the central issue, and that is, on a standard of insanity, to absolve responsibility for otherwise criminal conduct on the issue of intentional acts and knowing acts.

Let us start with you, Dr. Halleck. Why should there not be criminal responsibility if a person knows what he or she is doing and intends that act?

Dr. HALLECK. I think I would take the same stand my colleagues have taken. The jury will probably come to similar conclusions, whatever the standard is. When you get into talking about substantial capacity, it may be possible for the jury to acquit a few more, but basically I do not think it makes much difference.

Senator SPECTER. But if you are dealing with the mother who kills her child and the issue arises whether she knows what she is doing or is depressed or thinks that her baby is the devil, if she feels or believes that her baby is the devil, then I would think she does not know what she is doing. But if she does know what she is doing and does intend to kill the child, but is doing so because it is a terrible world and she wants to spare the child from coming into this terrible world, then that is the sort of conduct which we say one person ought not to be able to undertake at the sacrifice of another's life.

Now, why is it not sufficient to deal with the knowing, intentional act?

Dr. HALLECK. I would think—and I may be skirting your question a little bit—that the function of the psychiatrist is to point out that she thought she was killing the devil. If you ask me what I would do sitting on a jury, if I knew that information——

Senator SPECTER. Why do you say it is the function of the psychiatrist to say that she thought she was killing the devil?

Dr. HALLECK. Because that is what he is likely to discover in his examination of her. It is the function of the psychiatrist to provide facts as to what he thought was the mental state of that offender.

Senator SPECTER. But if you find that she thought she was killing the devil, would you not necessarily find that she did not know what she was doing or intended to kill her child? She was intending to kill the devil.

Dr. HALLECK. As a citizen, I would agree with that. As a doctor, I would have no opinion about that. That, again, is the issue of conclusory testimony. If I were sitting on that jury, I would vote for acquittal.

Nobody is insane until the jury says they are insane. It is like the umpire who says, "There are no balls or strikes until I call them." There is no medical basis for my saying that someone is insane. I am only speaking as a human being, just like a member of the jury, when I make that kind of statement.

Senator SPECTER. Well, the issue that we have to decide is not what the jury is going to find, but what the judge is going to say the law is. Would it be adequate, in your judgment, if the judge said, "If you find that the mother knew she was killing her child and intended to kill her child, then you may convict; if, on the other hand, you find that the mother thought she was killing the devil, then you may acquit by reason of insanity?"

Dr. HALLECK. My guess is that what would happen is what happened before the American Law Institute ruling became more prevalent, and that is that people played games with the word "know." There was argument as to "know" intellectually or "know" emotionally, and good attorneys and good psychiatrists were able to convince juries that she did not really know that she was killing the child.

[The prepared statement of Dr. Halleck follows:]

PREPARED STATEMENT OF DR. SEYMOUR L. HALLECK

I am grateful for this opportunity to present my views on the proper role of psychiatry in the administration of the insanity defense.

Given the philosophy and structure of our current system of criminal justice, I believe the insanity defense has some usefulness to our society. Our criminal code would have less meaning if we punished those who were incapable of choosing to violate the law. As Professor Stone has pointed out, the insanity defense may strengthen our criminal code insofar as it exempts only a few from responsibility and thereby loans credibility to the assumption that all others who are punished are capable of choice. It is also possible that the insanity defense serves to keep the role of psychiatry in the criminal trial more manageable. If there were no insanity defense, attorneys would understandably expand their efforts to use psychiatric testimony in other phases of the crime. If the defense were abolished, we might see efforts to use psychiatry to find more defendants incompetent to stand trial, to negate the mental element in specific intent crimes and to argue mental illness should mitigate the harshness of punishment. (Some might find such developments desirable but, if implemented, they would undoubtedly create new burdens for our courts.)

Psychiatrists can make some contribution in the insanity trial by helping to educate the jury as to whether the defendant had a mental disorder at the time of the crime and as to the manner in which that mental disorder may have influenced the defendant's behavior. Such testimony will of necessity be speculative, but it is within the rules of psychiatric expertise and can be useful to jurors. Once this testimony is given, I do not believe the psychiatrist should be asked to do anything more.

Psychiatrists should never be asked whether defendants knew right from wrong, knew the nature and quality of their acts, or lacked substantial capacity to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law. These are questions which are intended to define the legal concept of insanity. Nobody is insane until so designated by the judge or jury. A psychiatrist, therefore, cannot possibly judge who is insane in a scientific manner. When the psychiatrist testifies in a conclusory manner as to the ultimate standards of the M'Naghten or American Law Institute test, he or she is answering a moral question which should be answered only by the judge or jury. The psychiatrist, just like a member of the jury, may have an opinion as to the defendant's sanity. But, this is not a medical opinion. It is a moral statement which has no more scientific merit than the opinion of any juror. Psychiatrists should not be required to present conclusory statements in insanity trials.

Currently the insanity defense results in few acquittals. In my own state, North Carolina, I know of only three acquittals in the past ten years. I believe there may be good reasons for structuring the legal system so that such acquittals remain infrequent.

Our society, our legal system and, for that matter, the practice of most of psychiatry is based on the assumption that people have free will and are capable of making rational choices. To the extent that people view themselves as not responsible for their actions, they become less responsive to social sanctions and more susceptible to mental disorder. The state of non-responsibility must be ascribed carefully and only in circumstances where evidence of incapacity is substantial. This is much more than a legal issue. One of the major problems in current psychiatric practice is how to deal with an increasing number of people who will deny responsibility for their actions.

Changes in the criminal justice process which limit the nature of psychiatric testimony and which might limit the number of insanity acquittals need not be extreme. Conclusory psychiatric testimony is not legally mandated. It is only a matter of custom. The number of acquittals can be controlled by varying the test for insanity or by shifting the standard of proof or by shifting the burden of proof from one adversary to another. Any new change will have unpredictable consequences.

Our system of correctional justice is made up of many subsystems which interrelate with other systems such as the mental health system. Major changes in any procedure or doctrine reverberate throughout the entire system. I have noted one of the possible consequences of abolition. There are probably many other which are unforseeable.

The advantages of the "Guilty But Mentally Ill Plea" are far from clear. It is doubtful if those states which have legitimized this alternative have provided their citizens with more protection. They have merely assured that more offenders will be imprisoned. The promise that those found guilty but mentally ill will receive adequate therapy is likely to be illusory given the inadequate resources of our prison system.

Finally, I wish to emphasize that psychiatric experts who testify in insanity cases have an extraordinary difficult task. Much more is asked of them than of most other expert witnesses. They are asked to comment on the mental status of an offender at a particular time in the past when the doctor could not observe or examine him. They are asked to make moral conclusory statements on issues which are the province of the jury. When these demands are imposed on the psychiatrist in the context of the adversary process, it should not be surprising that psychiatric testimony is often difficult to understand and may appear to be exaggerated or contradictory. The fault does not lie with psychiatry. Nor does it lie with the adversary system or the insanity defense. There are relatively minor procedural changes which could remedy most of the issues which concern us without tampering with the established beliefs of our criminal justice system.

Senator SPECTER. Well, you may be right, and if you are, it does not make any difference whether it is the *M'Naghten* rule or the ALI standard or any standard. We are all wasting our time here this morning and as we write down these standards and debate them in the U.S. Senate.

But I disagree with that. I think it does make a difference and that there are some jurors who do listen, and that there are some witnesses, psychiatrists included, who do respond within the scope of what is defined to be relevant in the standards of proof, and some lawyers do observe the law.

So, we are trying to find the best standard. We cannot guard against its being disregarded and for a jury finding on its intuitive or gut reaction. But the standard we have to determine is what makes sense, and does it really advance the ball much.

Dr. Roth, does it help in any way to do more than say "knowing" and "intent?"

Dr. ROTH. I think one standard in practice in the great majority of cases will translate into the other standard. That does not mean that I feel we are wasting our time here, Senator. I am extremely gratified that we are having this discussion about what is a very difficult issue.

We were simply trying to point out as psychiatrists and from our knowledge of the legal literature and many discussions over the years that most people do not believe that the exact wording of the standard is the critical, determining factor in how the jury acts.

Senator SPECTER. Well, I am not looking for you to pass on the standard. What I am looking for you gentlemen to do is to answer the question of is there anything more that psychiatrists can tell us about what goes on in the mind of a person beyond that they knew what they were doing and intended their act, contrasted with that they were mentally ill, diseased or had a defect so that they really thought they were doing something else.

When you talk about the child and the devil, it is easy to understand.

Dr. ROTH. Right.

Senator SPECTER. Can you do anything more than that as a profession?

Dr. ROTH. I think that you got some nice responses from Dr. Prelinger earlier on this subject. I think that we are capable of examining defendants and attempting to reconstruct their thinking, with the limitations that I mentioned; namely, retrospective. There was no claim that this was perfect, but we are capable of examining defendants and giving our best medical opinion as to what the person was thinking, why they were thinking it, what their motivation for the act was, and our best attempt to reconstruct the person's thinking at the time.

There may be instances in which the "appreciation" notion is extremely important. Let me give you an example. I write a great deal in the area of informed consent and I deal with patients who refuse treatment; for example, a woman with a diabetic leg that is gangrenous and which has a 100-percent chance of causing her death, and it is rotten and it has maggots.

This woman is able to say—and these are cases I have actually seen—"Yes, I understand that you doctors believe that my leg will cause me to die. However, I know you are wrong. There is nothing wrong with my leg; my leg is getting better." The patient is able to maintain this belief, Senator, in contradiction to the objective evidence.

Now, we have a fancy name for this in our discipline; it is called denial. That denial standard relates to what Dr. Prelinger was telling you; namely, appreciation. We do look at other aspects of the mental state besides simply intellectual knowledge. We look at cognition; affect, or what is known as mood; emotionality; behavior controls. There are many aspects of the mental status that are relevant.

This is why you have, in effect, an irresistable impulse test even within the ALI standard. Of course, the notion of conforming one's behavior to the requirements of law does go to the volitional elements of the personality and the mental state.

What I am simply stating is that an adequate psychiatric examination does not only look at simple knowledge of the fact. It looks at emotional factors and higher level factors. The only point we are trying to make is after we have done our "psychiatric thing," then we want the jury to decide how this qets translated into a legal standard. I think that you lose something by getting rid of the "appreciation" language.

Senator SPECTER. Dr. Stone, a final question: Is there any standard that you could suggest beyond the one that you made with respect to adding the word "severe" to "mental disease" and "entirely lack substantial capacity" on dealing with this central question as to criminal responsibility for something which is knowing and intentional by some definition of having that quality of conduct affected by mental illness?

Dr. STONE. I would just like to make a suggestion to you, Senator, that the language here does not represent psychiatric thinking very much. I think it represents an effort by various people interested more in philosophy and interested in a number of other things to sort of formulate a test of moral responsibility.

I think these are questions that you could probably more profitably ask next week, or whenever it is, when you have the lawyers in, about how it should actually be worded.

Dr. Halleck raised the question, and many Senators apparently have commented on—and I have used the term "clown" about the extensive testimony of psychiatrists in the courtroom, in the sense that the legal system is being inundated by psychiatric testimony and that there is this disproportionate amount. I can understand that, and I am sympathetic to that.

I think that the way to deal with that, however, has to do more with the admissibility of psychiatric evidence than with the test of insanity.

So, my last remark to you would be I would hope that you could think in the direction of maintaining the ALI language and altering it in some way because it already reflects a great deal of thought by people other than psychiatrists about the way one should think about moral responsibility.

Senator SPECTER. Thank you very much, Dr. Stone. Dr. Beigel, do you have a final comment to make?

Dr. **Beigel**. Just very briefly, and perhaps reiterating what my colleagues have said, I think psychiatrists have an expertise about mental illness. Furthermore, we are willing to share that expertise in a court in the context of the adversary proceedings.

I think it is my personal opinion that changing the standard will not change either the extent or limits of our expertise. Whether changing the standard will further the jury's ability to make the ultimate decision that it is called upon to make is a question I cannot answer.

Senator **Specter**. What an extraordinary place to end. [Laughter.]

Thank you very much, gentlemen.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned.]

LIMITING THE INSANITY DEFENSE

WEDNESDAY, JULY 14, 1982

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Present: Senator Heflin.

Staff present: Bruce A. Cohen, chief counsel; Mary Louise Westmoreland, counsel; Marc Walpow, staff assistant; Arthur Briskman, counsel; and Paul Argesto, counsel.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good morning, ladies and gentlemen.

We will begin this hearing of the Criminal Law Subcommittee of the Senate Judiciary Committee.

We are proceeding today on the third of our hearings on the issues arising out of the case of the *United States* v. *Hinckley*.

The first hearing involved the testimony of the jurors, in terms of their understanding of the defense of insanity. The second hearing involved testimony from a series of psychiatrists, some of whom have participated in the Hinckley proceeding.

Today we are turning our attention to still another of the issues raised by the Hinckley acquittal, and that is, what procedures are appropriate for the detention of someone who has been acquitted of a criminal charge on grounds of insanity.

There are currently tests involved on, generally stated, whether the individual is a danger to himself, or a danger to the community, and this subcommittee is interested in the question as to what may be legislated on the subject of prolonged detention for someone who has been acquitted on grounds of insanity.

Is it constitutional, for example, to have a period of detention which relates to the act itself, if there has been a determination of criminal insanity. The threshold question of constitutionality has to be answered obviously before the second question can be addressed, and that is as to the wisdom of having such a legislative standard, if it may be constitutionally imposed.

We have a distinguished array of witnesses today, and we are pleased to call, first of all, Hon. Gerald Tjoflat, U.S. circuit judge, from the Court of Appeals for the 11th Circuit. Mr. Tjoflat is the Chairman of the Committee on the Administration of the Probation System for the Judicial Conference of the United States. We have had the advantage of talking to Judge Tjoflat in the past on other subjects, and we are very pleased that he has taken this time to be present and to offer the committee his insights on this very important subject.

Welcome, Judge Tjoflat. We will be pleased to hear your opening comments, and then there will be a series of questions which we would very much like your responses to.

STATEMENT OF HON. GERALD BARD TJOFLAT, U.S. CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE 11TH CIRCUIT; CHAIRMAN OF THE COMMITTEE ON THE ADMINISTRATION OF THE PROBATION SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES

Judge **Tjoflat**. Thank you, Mr. Chairman.

I must say that, first, in appearing at the invitation of this committee, I do not speak the views of the Judicial Conference of the United States or of the Probation Committee. Neither the Committee on the Administration of the Probation System nor the Judicial Conference have considered the subject of this hearing in its present context, and so the conference's views, if any, would have to come later.

Senator **Specter**. Judge Tjoflat——

Judge **Tjoflat**. My comments are really derived from my own experience, indepth experience in the criminal law field.

Senator **Specter**. Had the Conference or the committee considered the question, prior to the decision of the *Hinckley* case, in any other context?

Judge **Tjoflat**. The Criminal Law Committee in the past has considered, in the context of commenting on Criminal Code revision, the matter of the insanity defense, and the reflections of that Committee are in the minutes of the Judicial Conference of the United States that have been reported from time to time. They are available to this committee.

The Conference may have taken a position in the past, or the Criminal Law Committee may have, on the question of civil commitment in the Federal system. But as of this moment, it is my understanding that the Congress does not have before it, and none of the committees do at the moment, the question——

Senator **Specter**. Well, Judge, we understand the limitation of your authorization——

Judge **Tjoflat**. I will not qualify what I have to say. I think I can speak as a judge.

Senator **Specter**. We are pleased to hear your views of your own experience, speakinq for yourself, of course.

Judge **Tjoflat**. In the Federal criminal justice system, if somebody is acquitted, on a plea of not guilty by reason of insanity, there is nothing that a judge can do. No way of detaining the individual, there is no civil commitment procedure and in the case that brought about these hearings, had it been in any other Federal jurisdiction of the United States, the defendant would have been free to go; would have been discharged.

We do have facilities in the U.S. Bureau of Prisons for examining and treating persons who are mentally ill. A Federal judge, in any case in which there is a question whether the defendant is competent to stand trial, must have the defendant examined and make a determination whether he understands the nature and consequences of the proceedings, and can assist counsel in his defense. Such individuals are sent by the court to the Federal Correctional Institution at Butner, N.C., Springfield, Mo., or Lexington, Ky. Lexington, Ky., is the female facility. There they are examined and returned for trial when it has been determined that they are competent to stand trial.

Also, committed offenders, those who have been adjudicated guilty and sentenced to a term of imprisonment, who manifest psychiatric problems are usually transferred by the Bureau to one of these three institutions.

At Springfield, for example, there are 214 beds for psychiatric persons, and 86 of those beds are in the forensic unit in which they place nonconvicted persons who are being examined to determine whether they are competent to stand trial.

At Butner there are 121 psychiatric beds, and 6 of those are devoted to those cases involving nonconvicted persons who have mental problems, and who are awaiting a determination of whether they are competent to go to trial.

At Lexington there are 28 psychiatric beds, and none of them are separated out for nonconvicted persons. In summary, this is the present situation in the Federal system. There are no civil commitment proceedings; there are no procedures for committing somebody who has been acquitted by reason of a not guilty by reason of insanity plea.

There are, however, facilities in those three correctional institutions to handle these people. Limited facilities.

Senator SPECTER. Judge, what do you think we may do, constitutionally, on the subject of detaining someone who has been adjudged not guilty by reason of insanity, in terms of taking into account the act for which he was acquitted?

Judge TJOFLAT. Under the present, treatment of the insanity defense in the various circuits across the country I think that, constitutionally, the Federal Government could do what the States do. The States have a variety of methods of attacking the problem.

One could reason, I think, that where there has been an acquittal because the defendant was insane, there is a presumption that that mental condition continues, which the judge could judicially notice, and which by itself could authorize the judge to have the defendant committed for examination purposes and thereafter to determine whether he is mentally ill, and if so whether he presents a danger to himself or to others, in which event the situation would be akin to a civil commitment proceeding.

Senator SPECTER. But once there is a determination——

Judge TJOFLAT. The constitutional question would be: Why should a judge be permitted to immediately lock somebody up for examination purposes, without first having had some kind of a hearing?

Senator SPECTER. Now, are you on the subject of what happens, say in a Federal court?

Judge TJOFLAT. Let us take a Federal court where the individual——

Senator SPECTER. Let me pose the question.

The Federal court, the individual has been acquitted, and you said earlier that had Hinckley been tried in some other jurisdiction that he could have walked out.

Are you saying that the Judge could not say there has been a determination of insanity, and therefore I am going to hold him for an examination, or that there will be an absolute right on the part of a man like Hinckley to simply walk out the door?

Judge TJOFLAT. That is right, under the present Federal law.

Senator SPECTER. That the judge could not even say, I am holding him for an examination?

Judge TJOFLAT. No, because the defendant would immediately say, under what authority are you holding me? Are you holding me because I have committed an offense? And the judge would respond, no. Because he has been acquitted of the offense.

Senator SPECTER. But if that trial were to have been held in a Federal court, say in Philadelphia, then there could be a commitment proceeding for a civil commitment filed in the State court?

Judge TJOFLAT. In the State court.

Senator SPECTER. With appropriate examination.

Judge TJOFLAT. Assuming that the State could fetch the defendant between the time that he left the Federal courthouse and the moment of the proceedings in the State court.

Senator SPECTER. I am sorry, I did not follow that. What happened?

Judge TJOFLAT. Suppose I am the defendant in the Federal court in Philadelphia, and I am acquitted, and the court discharged me, and I walked out of the courthouse a free man. I suppose that if I thought the State was going to pursue me, I might be inclined to leave Philadelphia and the State of Pennsylvania.

Senator SPECTER. You might be inclined to do that, or you might be inclined to kill somebody else. After all, you have just been determined to be—adjudged not guilty by reason of insanity.

Judge TJOFLAT. That is right, but the point is——

Senator SPECTER. You have a continuing license.

Judge TJOFLAT. Nobody could hold me under the present law, in Philadelphia, until somebody else seized me, the State, in your situation.

Senator SPECTER. Until somebody else seized you, you say?

Judge TJOFLAT. Seized me. Seized my person.

Senator SPECTER. So that an individual in that situation would be concluded to be insane, presumptively not responsible for any of his acts while he is on the street, but you are saying the law is powerless, you as a Federal judge, sitting on the district court, would be powerless.

Judge TJOFLAT. Powerless to hold me, in my view. There just is not any procedure available. The Congress has provided no means that would entitle a judge in Philadelphia, a Federal judge, to hold this particular defendant. That is why he could walk out of the courthouse.

Senator SPECTER. Has that ever occurred, to your knowledge, that a person has been acquitted in a Federal court, and by reason of insanity, and has in fact walked out?

Judge **Tjoflat**. I have tried many cases as a State judge, and a Federal judge, in which the insanity plea was interposed, and I have never had a situation in which the defendant was acquitted.

Senator **Specter**. Have you ever heard of a situation where a defendant was acquitted and walked out of court?

Judge **Tjoflat**. Not in a Federal court. I have never seen one in a Federal court. Most of the cases in which I have experienced the insanity plea, in Federal cases, have been bank robbers. You rarely see an insanity plea in a nonviolent crime prosectuion.

Senator **Specter**. Well, that certainly is a gap and a void which ought to be addressed by Federal legislation.

Judge **Tjoflat**. Well, the public cannot understand the consequences of somebody being found insane at trial and then nothing happens to him. No one tries to cure him of his illness.

Senator **Specter**. Well, I have never seen a case, as you say, you have never, where a person has been acquitted in a Federal court and has walked out.

We shall attempt to see if there has ever been such a case. I have a strong instinct, from having some experience in the field should that have occurred, that the judge might not have known he was powerless and might have detained the individual.

Judge **Tjoflat**. He might have.

Senator **Specter**. Or knowing he was powerless, might have thought that the detention was an appropriate course, and to have the issue litigated, during which time there could be a State proceeding.

Judge **Tjoflat**. That is true. But one of the problems with Federal offenders in today's world is that they cross State boundaries indiscriminately, and I query whether the State, in some of these cases, would have any particular interest in committing a given defendant.

Senator **Specter**. Well, I would think that they would. I would think that the State would, for concern for the safety of their citizens.

Judge **Tjoflat**. Of course, in most State situations you would have to find a doctor or a relative, or somebody first to go to the State court and file a petition, disclosing facts.

Senator **Specter**. You do not think a Federal judge would be sufficiently competent?

Judge **Tjoflat**. To do it himself?

Senator **Specter**. Sure.

Judge **Tjoflat**. I would have some question about the ethics of that, Mr. Chairman.

Senator **Specter**. Why?

Judge **Tjoflat**. Well, he becomes an advocate for a position in the State court. He is a prosecuting party, as it were.

Senator **Specter**. How about the U.S. attorney?

Judge **Tjoflat**. The U.S. attorney could more readily do it than a judge. Because he, day in and day out, is in a position of taking a prosecutorial posture.

Senator **Specter**. What would you think the legislation ought to provide, Judge?

Judge **Tjoflat**. I would think that the legislation ought to provide, in the event of a case—and this is just a rough outline, where there has been an acquittal on an insanity plea, I would reason that a presumption flows from that, that the individual is then and there insane, in most cases. And I imagine that the psychiatric evidence, in most cases, would permit that inference. So that it would not be an empty presumption that would entitle the judge to send the individual to a psychiatric facility.

Senator SPECTER. Detain the individual?

Judge TJOFLAT. That is right.

Senator SPECTER. Hold him?

Judge TJOFLAT. Hold him. Detain him, send him to a psychiatric facility.

Senator SPECTER. State psychiatric facility?

Judge TJOFLAT. Well, if Congress were to draw the legislation tomorrow, there being no Federal hospitals, you would probably send him to Butner, the Federal prison at Butner, or the Federal prison at Springfield, as it were.

Senator SPECTER. So send him to a Federal installation?

Judge TJOFLAT. If it were a male, and Lexington if it were a female, where they have adequate—excellent facilities, really, in my view, to have the determination made whether the individual is presently mentally ill, and if so, whether the individual presents a threat to the safety of himself or others.

Thereafter, the examination having been concluded, the court would have to make a determination whether the person were mentally ill and posed such a threat and, if so, commit him to a facility, a hospital, such as you would in a State system now.

You have a logistical problem, whether or not you could, in effect, turn the psychiatric facilities at Butner, Springfield, and Lexington into such a hospital.

Senator SPECTER. Would you think it appropriate——

Judge TJOFLAT. Or you could contract with the State.

Senator SPECTER. Would you think it appropriate for the Federal Government to get into the issue, or would it be more appropriate to have the trial judge functioning on the presumption of insanity from the testimony, make a temporary detention, hold the person in custody, have him turned over to a State institution for appropriate proceedings to be brought as someone who ought to be detained for being mentally incompetent or insane?

Judge TJOFLAT. Are you talking about turning him over to the State facility so that the State can initiate the proceeding?

Senator SPECTER. Yes.

Judge TJOFLAT. I have serious Constitutional problems there.

Senator SPECTER. Why?

Judge TJOFLAT. When I say I have serious constitutional problems, I am in effect saying there would be a constitutional argument made that the Federal judge is now being the initial committing magistrate in a State competency proceeding, and I do not know whether a Federal judge, as a magistrate, can make the initial determination that somebody ought to be held in a State mental facility, in a civil commitment sort of a setting.

Senator SPECTER. Well, there are frequently orders issued after holding someone at a preliminary hearing, for that person to be detained in a State facility, awaiting a Federal trial.

Judge TJOFLAT. You could put him in a State facility. The Federal judge——

Senator SPECTER. The Federal judges do that all the time.

Judge TJOFLAT. He could say, I want him examined, and have him examined in a State facility, assuming that the executive branch of this Government made the arrangements. You could put him in a State facility.

Senator SPECTER. Do you know of any authority which would preclude that procedure?

Judge TJOFLAT. No. Other than just the contracting authority. Oh, the law does not provide for it now.

Senator SPECTER. Well, all right.

Judge TJOFLAT. There is nothing in the law that would provide that.

Senator SPECTER. There is no statute which provides it at the present time?

Judge TJOFLAT. No statute or criminal procedure rule.

Senator SPECTER. Suppose the Congress were to enact legislation that upon acquittal in a Federal court, outside of the District of Columbia, that the trial judge would sit as a committing magistrate, so to speak, and would hold the individual for proceedings under the State Mental Health Act, remitting that individual to State jurisdiction, do you know of any authority that would preclude that procedure?

Judge TJOFLAT. You are in effect saying that the Federal judge becomes the same as his State counterpart, for the initial stage of the commitment proceeding.

Senator SPECTER. Yes.

Judge TJOFLAT. You have a Federal-State relationship problem. I do not know whether the State would appreciate, and I do not mean that in a kindness sense, a Federal magistrate making the initial determination that, say in Florida, the State circuit judge does, and whether it would honor that. The State may say, well, here is this Federal judge deciding, at first instance, to trigger the invocation of the State commitment proceeding, and the Federal judge's order is not binding on us. The order does not construe the Constitution of the United States. You might have a supremacy clause problem.

I would recommend against that procedure, Mr. Chairman.

Senator SPECTER. And you would——

Judge TJOFLAT. If the objective is to have the individual who has been acquitted held so that it can be determined whether he ought to be released or not, the Federal Government, to wit, the judicial branch initially, should undertake the full responsibility. After all, it was the Department of Justice that filed the criminal charge that triggered the Federal jurisdiction in the first place. The Federal judge has an abiding interest in the administration of criminal justice in his own court and over the defendant; and if he sends him off someplace to be examined, he ultimately ought to make the commitment or the release decision.

Senator SPECTER. Is the Federal Government involved in any way in postacquittal insanity detention?

Judge TJOFLAT. The only way it could be involved would be if the U.S. attorney went to State court and invoked the State's civil commitment proceedings, after the acquittal of a defendant in a Federal court on grounds of insanity.

Senator SPECTER. That would be, as you say, a State insanity proceeding?

Judge TJOFLAT. That is right.

Senator SPECTER. But there is no——

Judge TJOFLAT. And the U.S. attorney would be acting as a citizen.

Senator SPECTER [continuing]. But there is no existing Federal insanity proceeding after an acquittal?

Judge TJOFLAT. None whatsoever.

Senator SPECTER. So you are suggesting as an alternative would be to create a new Federal insanity proceeding, postacquittal?

Judge TJOFLAT. That is right. The Federal Government would get into the commitment business, insofar as it concerns criminal offenders, or allegedly criminal offenders, acquitted on an insanity plea.

Senator SPECTER. Judge Tjoflat, take up just a minute, if you will, the issue which I posed earlier, the constitutional issue, as to whether the Congress may legislate on the subject of providing some detention which is related to the conduct for which a person has been acquitted on grounds of insanity.

Judge TJOFLAT. You inquire whether there are Constitution problems. The individual is acquitted, I think there could be a sound constitutional argument made that a presumption arises which would entitle the judge to have him detained for examination purposes.

Now, he has been examined, he is back before the judge, and the judge must determine whether to detain him.

Senator SPECTER. Correct.

Judge TJOFLAT. The question you ask is whether or not the evidence of the criminal conduct, which in effect is admitted at trial because an insanity plea is a confession and avoidance type of defense, can be considered by the court in determining whether or not to detain the individual.

Senator SPECTER. Correct.

Judge TJOFLAT. The issue before the court historically in these commitment proceedings is twofold. One is the person mentally ill. So let us assume that the judge found that he was mentally ill.

The next question is whether he poses a risk of danger, likely danger, to himself or others. Let us suppose that is the second question.

Senator SPECTER. And let us suppose that question is at some juncture answered in the negative. He is not a risk to himself or to society.

Judge TJOFLAT. I would think that the judge considered the criminal conduct that was presented at trial, and rejected that conduct as any indicia of future dangerous conduct toward others.

Let us suppose the insanity defense arose in the context of a bank robbery prosecution in which many shots were fired, and people were wounded, and there were assaults, otherwise, and he is acquitted.

Senator SPECTER. Well, let us assume that the judge has decided that neither factor exists. He is not a danger to himself, and he is not a danger to the community.

Judge TJOFLAT. I think the strong constitutional argument is made, and I cannot think of a rebuttal that the judge must release him.

Senator SPECTER. Must release him.

Judge TJOFLAT. Yes.

Senator SPECTER. He may not consider the nature of the act for which he was acquitted?

Judge TJOFLAT. Unless the Congress changes the substantive defense of insanity.

Senator SPECTER. Before getting to that, there will frequently be occurrences where a trial judge will impose a sentence, even though the trial judge may conclude that the defendant is not a danger to the community at the moment he stands before him for sentencing. It may be an issue of deterring others, it may be an issue of retribution or punishment, there are many objectives of the criminal law which may warrant a judge's imposition of a sentence.

So that at the time the individual stands before the judge, you are saying that the structure of the law as it exists at the present time, that he has been acquitted by reason of insanity, that whatever it was that the individual did may no longer be considered, once you answer those two questions in the negative; that is, he is not a danger to himself and he is not a danger to the community.

Judge TJOFLAT. Cannot be considered for purposes of incarceration.

Senator SPECTER. Detention.

Judge TJOFLAT. That is right.

Senator SPECTER. Could the act be considered for purposes of probation, or therapy, or reporting system, some lesser form of detention?

Judge TJOFLAT. Well, I think that the court could say he is mentally ill however, he does not present an immediate danger to himself or to society. I will, in effect, put him in an outpatient situation. Have him—he could still be within the court's jurisdiction, because the court has made a determination of mental illness.

The Congress could provide for all kinds of——

Senator SPECTER. Well, now you are suggesting some form of mental illness, lesser than a danger to himself or the community.

Judge TJOFLAT. Well, I am not suggesting that Congress necessarily should provide a mechanism for outpatient treatment. I am responding to your question, what happens if he does not pose a danger to society. That is something that the Congress ought to consider.

Senator SPECTER. Well, I am interested in the constitutional aspect. If you say the court cannot constitutionally detain, why can the court impose some lesser restriction on the freedom of the defendant?

Judge TJOFLAT. I think the court probably could, assuming that the standards were met.

Senator SPECTER. Well, what standard? You are determining that this individual is not a threat to himself, not a threat to the community, and you say constitutionally the court cannot keep the individual in detention, but the court can constitutionally, in your judgment, impose a lesser limitation on his freedom, by requiring him to report.

Judge **Tjoflat**. I will qualify that as might. Depending on the standard, I cannot think of a standard, but it might.

Senator **Specter**. Well, that is the next question. What kind of a standard?

And if you could structure that standard, why not a standard which would then warrant detention?

Judge **Tjoflat**. You might have gradations of harm, or risk of harm, to community or property.

Let us suppose, hypothetically, that at the hearing the judge had evidence before him that if the defendant is released to the city, where there are a lot of people, a lot of pressures, let us suppose, or to an unhealthy environment, he would pose a risk to himself or others. But that if he were released in another setting, the risk would be minimum. In the first situation, the judge would be authorized to detain him, and in the second situation, maybe partial detention might be in order. Because everything is not black and white.

I would think that an argument could be made that it is constitutional to consider variations of detention as they relate to the likelihood of injury to self or others.

Senator **Specter**. Judge Tjoflat, you said earlier that you could not constitutionally detain, under the current definition of insanity. What change in the definition of insanity would you suggest, where it would be constitutionally permissible to detain someone after an acquittal, or after some reconstituted form of a verdict?

Judge **Tjoflat**. Well, if you had a verdict of guilty, but insane, and there are two or three States, I cannot recall, which have that type of verdict, then what the law in that situation has said is that the person is criminally responsible, he is guilty of the offense, but he is nevertheless insane.

In that kind of a setting, or in that model, as I understand it, the individual is sent to some mental hospital. In that model the insanity defense does not preclude a finding of criminal intent. In other words, he has committed the crime. The mens rea has been established, but the jury has found, nevertheless, that he is insane. That is a model.

In that setting, he goes to a mental facility, and when his competency is restored, he goes back and finishes his sentence. That is one model.

Senator **Specter**. Do you think that is constitutional?

Judge **Tjoflat**. I would think that a strong argument could be made that it is. The Government, let us suppose, has established every element of the offense. They have established the mens rea that is required, say specific intent. The individual has——

Senator **Specter**. Can you have the mens rea of the specific intent if there is a determination that at the time the act was committed he was insane?

Judge **Tjoflat**. You might.

Senator **Specter**. How?

Judge TJOFLAT. I do not know. I have heard lots of psychiatrists testify, Mr. Chairman, in lots of different ways, and that is why I say you might. I have heard schizophrenia.

Senator SPECTER. I would be more interested in the views of an experienced judge, than of the views of a psychiatrist, on how you define mens rea and insanity.

Judge TJOFLAT. You might be able to have a definition. It depends on how you would define insanity. It depends on how the judge would charge the jury first on the elements of the offense.

Let us suppose there was competent evidence in the record to demonstrate beyond a reasonable doubt that all the elements of the offense were made out by the Government. Then let us suppose that there was an insanity defense, the elements of which, if found, if made out, did not preclude the Government establishment of its case.

Senator SPECTER. Well, I do not see, conceptually, how that could be.

Judge TJOFLAT. Well, I have a difficulty with it.

Senator SPECTER. When you have the concept of mens rea, you are dealing with the concept which has been a part of the law for centuries, and certainly has a constitutional base. It would be very difficult to structure criminal conduct without mens rea constitutionally, due process consideration.

Judge TJOFLAT. What you are saying is that it is difficult conceptually to understand how an insanity defense would be a defense at all, if it did not go to the heart of the mens rea.

Senator SPECTER. If it did not involve the issue of mens rea. So there you are structuring guilty but insane. You are saying that the person is guilty of the conduct, but he is insane at the time of the act, so he goes to a mental institution, and once he becomes sane, he is then subject to detention for some period into the future.

That, to me, is a much more circuitous route than the first alternative of saying that on detention for mental incompetency or sanity, but the standard need not be limited solely to danger to himself or to the community, but can consider the nature and quality of the original act.

Judge TJOFLAT. I am not suggesting that model that you asked me or—there are different ways of—we got off on this model of having both a conviction and an insanity defense at the same time.

Senator SPECTER. Judge Tjoflat, what would you——

Judge TJOFLAT. I am not acquainted with how that model works.

Senator SPECTER. What would your recommendation be to the congress on how to deal with the problem of the insanity defense, in light of the Hinckley verdict?

Judge TJOFLAT. What I said before, there would be a presumption that the individual continues to have the same mental condition that existed at the time of the offense.

Senator SPECTER. But he would not move in the direction of guilty but insane?

Judge TJOFLAT. No.

Senator SPECTER. And you would not make any efforts to change the law, so as to provide for some protracted period of detention, even after there is a determination that the individual is not dangerous to himself or to the community?

Judge **Tjoflat**. Some arbitrary period of detention?

Senator **Specter**. Well, I would not say arbitrary. Some rational period of detention.

Judge **Tjoflat**. What would be the test, I am asking?

Senator **Specter**. I am asking you.

Judge **Tjoflat**. I would think that you would have to have a legal basis for the detention. I would think that the establishment of insanity at trial under the insanity defense would be sufficient, that together with the evidence that supported it, to justify detention for examination purposes, until such time as the court is prepared to make a determination whether the individual is mentally ill, and poses a threat. That period of detention, I would think, would be constitutional.

Senator **Specter**. Judge Tjoflat, thank you very much.

We are very much indebted to you for coming here this morning, and for sharing your views with us. We are very appreciative.

I would next like to call Mr. Paul D. Kamenar, and Ms. Maxene Kleier.

Mr. Kamenar is the Director of Litigation, Washington Legal Foundation. Ms. Kleier is consultant to the Florida Community Mental Health Director; and a member of the Governor's Commission on Advocacy for the Developmentally Disabled.

Welcome to the hearings. We are very pleased that you could join us today.

The question of central concern to the Committee today is the issue of procedures which would appropriately, constitutionally justify, permit detention after a determination of not guilty by reason of insanity, but even beyond the point where the individual is determined to be no longer a threat to himself or to the community.

We would appreciate it if the course of whatever else you would like to testify to, that you would address that specific issue, and we are very pleased to hear from you, Mr. Kamenar, at this time.

STATEMENTS OF A PANEL CONSISTING OF PAUL D. KAMENAR, DIRECTOR OF LITIGATION, WASHINGTON LEGAL FOUNDATION; AND MS. MAXENE KLEIER, CONSULTANT TO FLORIDA COMMUNITY MENTAL HEALTH DIRECTOR; MEMBER OF THE GOVERNOR'S COMMISSION ON ADVOCACY FOR THE DEVELOPMENTALLY DISABLED

Mr. **Kamenar**. Thank you, Mr. Chairman, Senator Heflin.

I appreciate the opportunity to come before the committee to testify on this very important issue.

The Washington Legal Foundation, by way of background, is a nonprofit public interest law firm that has about 80,000 members, and an additional 120,000 supporters nationwide. We have represented over 100 U.S. Senators and Congressmen in various constitutional cases before the courts, on a variety of issues.

We do——

Senator **Specter**. Not on the insanity issue?

Mr. **Kamenar**. Not on the insanity issue, at least not yet, I hope.

But part of the foundation's activities includes a significant program that we are very proud of, and that is the crime victims rights program. As part of that program, we advocate the rights of victims of crime. We have published a Crime Victims Impact Statement Manual, that was used heavily by Senator Heinz in drafting S. 2420, the omnibus crime victims rights bill, this last few months.

As a part of our crime victims program, we also advocate the rights of victims to sue their attackers in civil court, and in that regard we are currently representing the Secret Service Agent in a civil suit in the U.S. district court here in the District of Columbia against John Hinckley, Jr., for the injuries caused to the Secret Service agent by the shooting.

I may add that James Brady and Officer Delahanty have similarly filed civil suits, and that case is now going forward before Judge Penn of the district court. It had been held in abeyance pending the outcome of the criminal case.

I may add that we are—that the foundation has issued a subpena to John Hinckley, to take his testimony at St. Elizabeth's Hospital, for July 26. At this point that may be postponed, depending upon the hearing that may be before Judge Parker on August 9. I am still discussing with Vincent Fuller the details of that particular deposition.

Senator SPECTER. Is there any problem with taking the deposition in a civil proceeding of someone who is insane?

Mr. KAMENAR. Well, that is the point—the point is, if I may just give you the broad picture, if a person is found not guilty by reason of insanity in a criminal case, it does not preclude his liability in a civil case.

As you are probably painfully aware, in the Federal court, the burden of proof is on the prosecution to prove beyond a reasonable doubt John Hinckley's insanity. When he walks in the civil court, he is presumed to be sane, and the burden is on him to prove, by the preponderance of the evidence, that he was insane. So there is no dispositive issue here on Hinckley's insanity, because the jury did not really find Hinkley insane.

What they did find, technically speaking, is that the prosecution failed to meet its burden of proof, because they were already given a set of facts, and Hinckley was presumed to be insane.

Senator SPECTER. Well, what is the preliminary inquiry, if any, to determine insanity, as a basis for taking a deposition? Assuming a person is clearly insane, there is no issue that you cannot take a civil deposition, is there?

Mr. KAMENAR. Well, that is not the case at all. There has been no finding at all that John Hinckley is insane. I just want to make that point doubly clear.

Senator SPECTER. I know there has only been a finding that he is not sane.

Mr. KAMENAR. Right. He has raised the defense in his civil suit. He raised his defense two and three——

Senator SPECTER. My question to you is, If it were plain, by any standard, that an individual was totally deranged, a raving lunatic, that person's deposition could not be taken for a civil proceeding, could it?

Mr. **Kamenar**. I do not see any rule that prohibits that. In fact, that is part of the purpose of the deposition, is to see if he is insane, and under oath and cross examination, in the deposition, if he starts acting like a raving lunatic, I can certainly adjourn the deposition for a later time, until he has restored his sanity, or what have you, but there is no Federal rule that I know of in Federal Rules of Civil Procedure, that protects the civil defendant.

Senator **Specter**. So you are saying that there does not have to be a threshold determination of insanity or sanity for the purposes of taking a civil deposition?

Mr. **Kamenar**. No, not——

Senator **Specter**. You might not be able to use it at a later time if he is concluded to be insane at the time that the deposition was taken?

Mr. **Kamenar**. That is right. I think what you are asking by analogy, is when there is a competency hearing in a criminal case to determine whether they could even stand trial, is there something similar in a civil case?

Senator **Specter**. Well, his testimony would not be competent for use—it would not have any probative value in an evidentiary proceeding if he were insane. If he were a raving lunatic.

Well, it would not be admissible, would it?

Mr. **Kamenar**. He may—that may be deemed to be inadmissible in terms of direct evidence, and may be used for other evidence, impeachment purposes, or obtaining other evidence resulting in his mental state. But the whole question resolves, I think the larger question that looms behind this is what do we mean by insanity, and it seems to me that you have had conflicting testimony by various psychiatrists on this issue, and I would just endorse wholeheartedly the approach that is given by the State of Idaho, which you will be hearing, of course, testimony later on.

DEFINITION OF INSANITY

But the problem with the current test of insanity for the criminal case, and this does not necessarily apply to the civil case, and that is the ALI standard: Whether the defendant appreciated the wrongfulness of his conduct, or could conform his conduct to the law. The problem with that is what do you mean by appreciation?

There was conflicting briefs back and forth in a criminal trial that was never really aired in the newspapers, but if you read those briefs filed by Hinckley's attorneys and by the U.S. Attorney's Office, you will see that there is a very crucial question here in terms of what do you mean by "appreciation." Do you mean cognitive appreciation, or do you mean emotional appreciation?

I would submit that if you use the ALI test, which I think has serious problems to begin with, this appreciation test, that you at least stay to the cognitive appreciation, namely, did Hinckley know when he pulled the trigger that a bullet was going to come out of the barrel of his gun and injure the people that he was pointing the gun at?

If he cognitively appreciated that, he would not be insane. But his attorneys say, well, he did not emotionally appreciate it; he did not really identify, and this is what the psychiatrist testified to on the stand, that he did not really identify with the injuries that would take place, but that it was all part of this larger picture that he had, the psychosis and the Jodie Foster fixation, et cetera.

But I think there is plenty of law. First of all, let me just say there is nothing in the Constitution that gives anybody a right to raise the insanity defense, and I think that that right can be legislated by the Congress, and by various State legislatures. And what Congress can do, Congress can take away, and what Congress can give, Congress can also condition.

If I may just give examples of other crimes, where intent is not really an issue. We have crimes like statutory rape, possession of illegal drugs and illegal weapons, contraband, involuntary manslaughter, et cetera. Those are all criminal acts. But the intent is not what is really the issue before the court.

If society can make a value judgment that certain crimes that are committed by defendants are heinous enough, society can say, "we do not care if you have a Jodie Foster complex." If you knew that what you were doing was wrong, and you intended your consequences of your act, that is it. You are guilty of that crime. Maybe, of course, his mental condition can be evaluated in terms of treatment, how shall we treat this person, et cetera, but I do not think we have to worry about constitutional problems on how that insanity defense may be conditioned.

With respect to what you said earlier, Senator, to the prior witness, I would suggest that maybe as another alternative, although not my favorite choice, you can condition the insanity defense on the right of the judge subsequently having the powers that you talked about earlier, that is to provide some kind of future jurisdiction over that particular defendant in terms of ordering him, for example, to report once a week to an outpatient clinic.

Senator SPECTER. Do you think that constitutionally a judge may keep a person in custody after he determines that he is no longer a danger to himself or to society, once that individual has been acquitted by reason of insanity?

Mr. KAMENAR. Assuming that we keep the same law as it is, if we are talking about today, with the problems that we have with the substantive nature of the insanity defense, I think there may be a problem with the judge keeping custody, but I do not see a problem with a new law saying, "OK, let us keep the insanity defense, but if you are going to interpose that as a defense, be aware that you are going to have certain things that will happen to you if you are successful in that defense."

Senator SPECTER. Such as?

Mr. KAMENAR. Such as the judge can have continuing jurisdiction over the person, in terms of ordering him to report to certain——

Senator SPECTER. Under what standards?

Mr. KAMENAR. Well, any standard that the Congress would like to devise. Because the nature of the testimony presented at the trial, that even though he is no longer a danger to himself and society, that was determined by some psychiatrist, does not mean the judge, as a factfinder, can find that that is necessarily so.

Senator SPECTER. Could he constitutionally say that a person who goes with the insanity defense, he has an understanding that the judge can retain jurisdiction over him if he is acquitted, why could you not similarly say that the judge could keep him in detention?

Mr. **Kamenar**. Well, that may—you may try to do that. I think that would probably—I think there is more of a constitutional objection to actually holding a person completely incarcerated if they are found not guilty by reason of insanity, as opposed to some sort of a probation or parole, saying you are released, but you have to follow certain guidelines in terms of reporting to various doctors, or examinations along the way.

I think that is not the way to approach the whole problem to begin with. I think we have to get down to whether or not we are going to keep the insanity defense as it currently is, or whether there should be some major overhaul.

Senator **Specter**. Senator Heflin?

Senator **Heflin**. Could the judge, under the detention, if the man is found not guilty, could he hold him—I mean constitutionally, can he hold him, or require various and sundry things?

Mr. **Kamenar**. Well, yes. In fact, in this court, right in this jurisdiction, Hinckley was found not guilty, but Judge Barrington Parker ordered him to St. Elizabeth's for this 50-day period. That same law could be enacted in all jurisdictions so there is at least a preliminary power that the judge may have.

As you know, there is a case pending before the court of appeals, *United States* v. *Cohen*, which may in fact invalidate that law, because the court of appeals ruled that there was an equal protection problem. I will give you a quick background on that case.

The defendant came in, he had been picked up in front of the People's Republic Embassy. He had several rifles, and Molotov cocktails. He was sent to St. Elizabeth's. He later came before the judge, I believe, and in that case the judge said I am not satisfied with these reports, and sent him back for further observation.

Well, his attorney said he did not have to be there in the first place, because District of Columbia is the only jurisdiction that requires this type of mandatory review at St. Elizabeth's, and no other jurisdiction in the country has it. Therefore, you are violating his right to equal protection of the law.

A very absurd conclusion, in my view, but the judge's decision means that Congress could do something about that problem. Congress could at least take the D.C. law, tighten it up as much as you want, and apply it to the whole country.

Senator **Heflin**. If a person is insane, and there is an attempt to punish him, does the issue of cruel and unusual punishment possibly come into play?

Mr. **Kamenar**. It certainly does, Senator, and I can give you an example of how that has come into play in the similar circumstance.

District of Columbia, and a few other States have laws which are called preventive detention, whereby the judge, if he finds that the person could be a violent offender, or a repeat offender, and may go out and commit another crime while he is awaiting his trial, can send him into prison for, I think it is, 60 days, before his trial comes up. That case went to the Supreme Court this term, *United States* v. *Edwards*, and the Washington Legal Foundation filed an amicus brief on behalf of the Government in that case, and the Supreme Court denied review certiorari.

Basically what the Court did, by denying review, was to leave intact the D.C. Court of Appeals' unanimous en banc decision which found it constitutional and not violating the excessive bail clause of the eighth amendment that was actually in point; but I think by analogy, the cruel and unusual punishment clause would similarly come into play, because I think as it stands, Congress has some power to deal with this. Again, how long you could hold a person, prevent and detain, whether in St. Elizabeth's for 50 days or 60 days, or 2 years, I think at some point that issue of cruel and unusual punishment comes into play. That is why I keep coming back to my basic theme, that maybe we need to look at the insanity defense to begin with, rather than the problems that generate from the law itself.

Senator HEFLIN. Well, we are looking at certainly all of that, but I think that there should be some tightening up of these matters. But I am not sure that under the language of not guilty by reason of insnity, that it does not put the Government into some position of awkwardness as to future detention, future treatment required in effect involuntary servitude, or involuntary status.

If a name change were to occur in the plea, and in the verdict, and I do not have any magic language but would assume something like indictment proven, but defendant not responsible because of insanity, whether some language of that would put you in a better position relative to constitutional attacks that might occur if a person were held.

There have been advocates for holding NGRI that they be defendants under the jurisdiction of the court for the maximum amount of the punishment of the crime charged, and that they either be under the supervision of the court or in detention or treatment.

And I am not advocating this, but I am just exploring this as being a possibility to prevent constitutional attacks that could occur.

Mr. KAMENAR. I appreciate the Senator's concern there in terms of trying to maybe change the names a little bit. I am afraid, however, that Federal judges are very quick to strip away names and look at the substance of what is being done. They look, as you well know, behind labels that Congress puts on various matters, and examine what they call the legislative intent, and if in fact all you are doing is changing the name a little bit, I am afraid that simply would not carry the day, and I think we need to do more.

Senator HEFLIN. Well, that depends on judges, and it depends on the language, and it depends upon the legislative history that could be made rather clear.

Mr. KAMENAR. That is true. I am just saying that in my view I do not think it will completely solve the problem. It will just cause more litigation, perhaps, and an adverse finding.

I would think that if you make do a substantive change, go to the roots of the matter, and then basically the courts will be left with the legislators findings. As I said earlier, there is nothing in the Constitution that allows anybody to raise the insanity defense, and what Congress can do, Congress can revise, condition, revoke, or whatever it wants.

I think I would just probably conclude my testimony by—well, I have a prepared statement that I would like to submit for the record. In there I give several examples of various people who are found not guilty by reason of insanity, and then were later judged to be no longer dangerous to themselves or others, and then were released, and subsequently committed various other violent acts, murder, rape, mayhem, et cetera, and so there is obviously a problem with having psychiatrists being able to successfully predict future violent behavior.

There has, of course, also been civil suits filed by victims of crimes against psychiatrists, against mental hospitals, against the Federal Government and U.S. Parole Boards for releasing people who they thought in their scientific judgment were no longer dangerous, but in fact turned out to be.

So maybe there is something there where the judge can retain some jurisdiction and say, well, that may be a finding by you, Mr. Psychiatrist, that he is no longer dangerous, but as a judge, I am going to rule otherwise, and commit him for some more treatment, or what have you.

Finally, in terms of the civil suit, we unfortunately find that in any case, whether a person is insane or not, a victim has trouble trying to get compensation, and part of the problem is that the—if you receive a judgment against a criminal, that judgment may be discharged in bankruptcy by the criminal.

However, the current law, the bankruptcy law, does not discharge punitive damages. I think that Congress may want to look at revising the bankruptcy law to help the victim of a crime. It seems to be a little bit strange, but it is a legal problem here, that not only should punitive damages not be discharged but also compensatory damages, in any case, where a person has received a judgment in civil court against another person, regardless of whether they are insane or not, for the injuries that they suffered.

A judgment is good for 20 years, and a person may go out and write a book about his crime. Of course, you know in New York there is the Son of Sam law that prohibits a criminal from profiting, so to speak, by writing about his notorious conduct, and I think Congress has a responsibility, of course, to focus on the rights of the law abiding public and the victims of crime.

Thank you very much.

If you have any other questions, I would be glad to answer them.

[The prepared statement of Mr. Kamenar follows:]

PREPARED STATEMENT OF PAUL D. KAMENAR

Mr. Chairman and Members of the Subcommittee, I am Paul D. Kamenar, Director of Litigation for the Washington Legal Foundation (WLF or Foundation). I am here at the request of the Subcommittee to testify on various aspects and legal ramifications of the insanity defense. On behalf of WLF, let me express my appreciation to the Subcommittee for this opportunity to present our views on this important topic.

The Washington Legal Foundation is a nonprofit corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in matters affecting the broad public interest. WLF has more than 80,000 members and 120,000 additional supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the establishment of a Crime Victims Program. This program is designed to advance the rights of crime victims and the general public and to help reduce the alarming crime rate in America. Among other activities, WLF provides educational materials, legal guidance, and assistance to the victims of violent crime. The Foundation's *Crime Victims Impact Statement*, which has been distributed on a nation-wide basis over the last year and a half served as a model for the Victim Impact Statement provision of S.2420, the "Omnibus Victims Protection Act of 1982," recently introduced in the Senate.

One aspect of WLF's Crime Victims Program is to encourage victims of crime to sue their attacker for civil damages. In that regard, the Foundation is serving as legal counsel on behalf of the Secret Service Agent who was shot and wounded by John W. Hinckley, Jr. in a civil suit for damages filed against Hinckley.

Similar suits have been filed by James Brady and D.C. Police Officer Delahanty. Since Hinckley has raised the insanity defense in the civil suits, it is my understanding that the Subcommittee is interested in learning more about the implications of the insanity defense in both the criminal and civil contexts.

Insanity Defense

The Foundation believes that it would be in the public interest to review seriously the current state of the law as it regards the insanity defense in a criminal trial. On the federal level, the prosecution has the enormous burden of proving a person was legally "sane" beyond a reasonable doubt. Even if one were to shift the burden to the defendant, the current test of insanity -- whether the defendant appreciated the wrongfulness of his conduct or if he did, was he able to conform his conduct to the law -- raises a host of problems concerning the role of psychiatrists at the trial and the function of the jury. Indicative of the confusing and complex role that psychiatrists serve when testifying on insanity is the statement by Dr. Bear, the Harvard psychiatrist who testified for Hinckley's defense. He concluded his expert testimony by stating to the jury that it was his "sense of justice" that Hinckley should not be punished for shooting the President of the United States and three others. Clearly, it is not Dr. Bear's "sense of justice" that should be controlling. It is our collective "sense of justice" that should decide, through our elected leaders, what laws should be enacted.

Without going into detail, there are many criminal laws that hold people criminally accountable for their acts even though there is no specific intent to commit the crime. Possession of stolen goods, contraband (illegal drugs, unregistered guns) and the like do not focus on the intent issue.*/ Involuntary manslaughter, statutory rape, and similar crimes are examples of imposing criminal culpability for behavior that society deems unacceptable, without focusing on intent.

---

*/ Notwithstanding the jury's verdict in the Hinckley case and the burden of proof issue, one may find the result difficult to understand, especially the verdict reached for Count 12, carrying a pistol without a license in violation of 22 D.C. Code §3204. The testimony focused on Hinckley's insanity for the shooting itself, and not for crimes preceding the shooting, such as carrying a pistol.

All of the problems relating to the insanity defense appear to have been addressed in a common sense way by the State of Idaho. Effective July 1, 1982, Idaho eliminates insanity as a legal defense. Jurors may still consider psychiatric evidence in determining whether or not a defendant charged with an intentional crime intended the probable consequences of the act, but no longer will they be wrestling with the American Law Institute (A.L.I.) test to determine whether or not a defendant is legally insane, and therefore not culpable for his actions.

We believe the Idaho approach to the insanity defense is in the public interest and should be studied carefully as a possible model for federal reform.

Post-Trial Commitment

Under D.C. law, a person who is found not guilty by reason of insanity is committed to St. Elizabeth's Hospital for 50 days, after which he may be released if found no longer a danger to himself or the community. The person may be insane, he or she may think they are Napoleon Bonaparte or are being pursued by the CIA, but if they are not a danger to themselves or others, they may be set free. Indeed, a person may even be set free immediately if a recent U.S. Court of Appeals ruling is upheld, U.S. v. Cohen, which struck down the 50-day commitment procedure as unconstitutional under the Equal Protection Clause because no such law exists in other jurisdictions.

There are, unfortunately, many horrible examples of a person being released from mental hospitals upon the certification of psychiatrists, only to commit violent crimes once again.

- Joseph Morgan was committed to St. Elizabeth's Hospital for acute brain syndrome due to alcohol intoxication after beating his wife repeatedly. Shortly before his release in 1967, he promised to kill his wife if he ever got out. Shortly after his release, he shot his wife. He was acquitted of the murder at an uncontested trial before a judge who found him not guilty by reason of insanity.

- Edmund Kemper murdered both his grandparents and spent 5 years in the Atascadero State Mental Hospital. In 1969, he was released as cured and between 1972 and 1973, he killed 6 college co-eds and his mother in a most grisly manner. Dr. Joe Fort, a psychiatrist and expert on insanity, who testified at this trial, favors the abolition of the insanity defense, stating that most people who claim insanity are "sociopaths" or, in common terms, "criminals" who are culpable.
- Herbert Mullin had been civilly committed to various California mental hospitals. Each time he was released. Within a 5-month period, he killed 13 people because of voices inside his head telling him to.
- Gregory Thaddy of Wichita, Kansas killed his parents in 1975. He was found not guilty by reason of insanity, and was thus legally permitted to inherit part of their $400,000 estate.
- Garrett Trapnell, son of a prominent Virginia family, committed numerous crimes over a period of years from armed robbery to airline hijacking, each time convincing the court he was insane and then convincing the mental hospital that his sanity was restored.

These are only a few examples of the shortcomings of the medical community to treat persons with mental problems and to predict their future behavior accurately. The Subcommittee should be fully aware of this problem when revising the insanity defense to ensure the safety of the community.

Insanity Defense in Civil Trial

As the Subcommittee is well aware, in the criminal case, once Hinckley introduced evidence on his insanity, he was presumed to be insane and the burden of proof shifted to the prosecution to prove beyond a resonable doubt that he was sane. In the civil case, however, Hinckley is presumed sane and the burden is on him to prove that he was insane. Thus, it is conceivable that two different juries in the same U.S. District Court may reach opposite conclusions on the sanity of Hinckley.

The fact that a person is found not guilty by reason of insanity does not mean that the issue is precluded from further resolution in a civil case. The jury's verdict of not guilty by reason of insanity only means that they did not believe that the prosecution met his burden of proof of proving Hinckley sane beyond a reasonable doubt. It was not a factual determination of Hinckley's sanity.

However, the opposite situation produces a different result. If Hinckley were found "sane" in a criminal case and thus "guilty," such a finding would be dispositive in a civil suit under the doctrine of "collateral estoppel." This doctrine applies in any criminal proceeding regardless of whether sanity is in issue. In other words, the law in most States is that a criminal who has been found guilty is "collaterally estopped" from denying his liability in a civil suit for damages incurred in the course of committing the crime. The question then is only a determination of damages.

And even if a defendant in a civil suit is found to be insane, the law does not necessarily relieve that person from liability. The general rule is that an insane or mentally incompetent person is liable to his injured victim for compensatory damages (i.e., medical bills, pain and suffering, etc.), but may escape liability for punitive damages. Punitive or exemplary damages are designed to punish and deter, and the reasoning is that if a person is so insane or "undetterable," then the assessment of punitive damages would not serve its purpose. Nevertheless, there is legal authority to the effect that punitive damages may be assessed against an insane person depending upon the nature of the insanity. If, for example, the insanity or mental disease was of a long duration during which there were lucid moments when the defendant realized that he had a problem and should seek professional help, the assessment of punitive damages may very well be appropriate and serve a public policy purpose. This would be in contrast to a situation where the tortious act was committed in a spontaneous manner by a person who suddenly and unexpectedly "snapped."

In any event, it is not altogether clear what exactly is the definition of "insanity" in a civil case as opposed to a criminal case. Furthermore, there are many civil cases where psychiatrists, mental hospitals, parole boards and others are held civilly liable for negligently releasing a person who manifested dangerous and violent tendencies. And the United States Government (i.e. taxpayers) has been also found liable in these cases under the Federal Tort Claims Act.

One problem with the victim receiving compensation is that it is difficult to recover from the criminal, whether adjudged insane or not. The law allows the accused to exhaust all his assets on his defense with no assurance the victims will be compensated. In a different context, there is legislation pending that would require a person on parole or probation to compensate his victim as a condition of parole or probation. Perhaps a similar system could be implemented with respect to persons who may be released after a finding of not guilty by reason of insanity. Furthermore, in notorious cases, a criminal may even profit from publicizing his story. New York's "Son of Sam" law and similar state legislation prohibits a person from profiting from their crimes; the same could be true of insane persons.

Conclusion

The Washington Legal Foundation applauds the efforts of this Subcommittee to examine critically the insanity defense. The rights of the law-abiding public must be protected and their sense of justice must be reflected in the administration of our laws. The Foundation stands ready to assist this Subcommittee as much as possible to ensure that the broader public interest is enhanced. Thank you.

Senator **Heflin** [presiding]. Ms. Kleier?

STATEMENT OF MAXENE KLEIER

Ms. **Kleier**. Thank you.

I also have a statement for the record. I would like to speak, please, to several of the highlights in the statement.

Senator **Heflin**. Thank you.

Ms. **Kleier**. I am going to talk about management in mental health care, and some about treatment and insights. Considerations in management: Prevent disease escalation, prevent crime, and management after the crime.

My credentials to speak on the topic: My oldest daughter began overt display of mental illness in 1965. She has been ill for 17 years, with one complete remission when treated outside of the United States.

Her sister, 2 years younger, became ill in 1969.

On December 18, 1973, I entered our home to find the body of the younger girl sprawled just inside the front door. She had been stabbed to death.

The older girl was charged with murder. Five months later, a few days before trial, the judge handed down a verdict in his chambers, "Not guilty, by reason of insanity." She has been in a State hospital forensic unit for more than 8 years. She will never go to trial.

During the last 17 years, mental health entities in State, out of State, outside of the United States, public and private have been utilized. Nowhere did we find appropriate ongoing management of the client.

After the murder, I determined to analyze the horrendous state of mental health care. Systematically, I have studied mental health care, made myself available to families entrapped as we were, struggled to understand and unravel bureaucratic processes and learned to lobby.

What happened in our home should not have happened. What can be done to avert similar tragedies for other families? For society?

Taxpayers have a right to see mental health care moneys properly expended for preventive measures. Taxpayers should not accept knee jerk responses to crises.

In 1979, Governor Graham appointed me to the State Human Rights Advocacy Committee (which I presently chair) and to the Governor's Commission on Advocacy for Persons with Developmental Disabilities. Governor Graham, the statewide Human Rights Advocacy Committee, and the Governor's Commission are supportive of mental health care reform.

In 1980, I was instrumental with legislation to establish a statewide case management intake system for the mentally ill. The bill was sponsored by Senator Harry Johnston and largely due to efforts by Representative Marilyn Evans-Jones, it was passed. Not one mental health care entity supported my efforts.

By October 1 of this year, the first step of this system will be in place. Due to the compassionately concerned and efficient HRS Secretary, David Pingree, and HRS Administrators, Dr. James Howell and Larry Overton, I serve as a volunteer consultant to the Florida

Department of Health and Rehabilitative Services for implementation of the first statewide mental health care management system in the United States.

Consistent, coordinated management has to replace sporadic, hard to access, pillar-to-post mental health care, which is frequently provided as fragments of care by service vendors who contract with the State. There are many good vendor services which deserve proper utilization and recognition.

INSIGHTS TO DEFENDENT BEHAVIOR

After the murder I telephoned a psychiatrist in another country to ask what to expect if my daughter was charged and found guilty. He said she would remember every detail and would welcome the opportunity to alert the world to her delusions. Did you note Hinckley's great disappointment in being unable to testify?

I believe that homicide can be route chosen for indirect suicide—perhaps a cowardly route. Read closely publicized cases and you will find evidence that the sick individual fantasizes being killed in the process of the crime or as punishment for the crime.

SENTENCING OF MENTALLY INCOMPETENT DEFENDANT

My goals in mental health care are for prevention of situations like we are discussing here today. However, as deinstitutional proceeds without proper community facilities and with the improperly managed client released in chemical remission, I am forced to consider prison alternatives for the mentally incompetent defendant.

One comment before I give my recommendations.

How can an individual be considered not dangerous to himself and others when his act has indicated otherwise?

My recommendations see medical supervision as the crux of rehabilitative procedures. The mentally ill are too frequently reluctant or unable to accept responsibility for their own medication.

RECOMMENDATIONS

Step 1: Incarceration in a secured, structured, medically supervised facility—preferably in the home community with case management. Incarceration should, in my opinion, have a minimum residence time established by statute. Release at termination of statutory placement should be by concurrence of three mental health professionals, the involved judge and a committee of persons who will be involved with the client upon release—the final decision to be made by the judge. A drug holiday should be utilized during this step to determine individual's potential when not medicated.

Step 2: Mandatory assignment with case management to a community facility—structured and medically supervised—which prepares the client for living successfully in the community.

Again, I think the term of residence should be statutorily regulated and release to community should follow procedure suggested for release from the secure facility in step 1.

Step 3: A probationary period, living in the community, with ongoing case management and medical supervision. Term of probation and criteria for final release to be statutorily determined as in steps 1 and 2. The probationary term should equal or exceed the total time span of step 1 and step 2.

VERDICT TERMINOLOGY

I am convinced that "guilty" must be part of verdict terminology. Misrepresentation of fact further confuses the mentally incompetent defendant and may be a deterrent to rehabilitation.

My recommended steps for incarceration and treatment provide specific expectations for the defendant and society as a parallel to usual sentencing procedures. A nonfactual verdict with nonspecific sentencing in no way relates to normalization.

I believe, for good reasons, that abnormal reactions to abnormal behavior create anxiety and confusion for the mentally disturbed.

INTROSPECTIVE TREATMENT

In treatment, I must plead for less emphasis on introspection. As mind mending increases, introspection decreases. The goals in mending minds cannot be rationally related to disproportionate encouragement of introspection.

DETERMINISTIC PHILOSOPHY AS IT AFFECTS MENTAL HEALTH CARE

Threaded through all mental health care are the detrimental deterministic philosophies of many mental health professionals. All of us are surely influenced by our environments. Why individuals respond differently to environmental factors is unknown. Each of us here can be thankful that today we are not functioning from distorted unrealistic perceptions. That may not always be true.

Expectations for restoration of mental health for an individual hostile to family members, teachers, or friends cannot be optimistic. A hostile individual attempting to relate to guilt harboring support individuals cannot be a good therapeutic environment.

Hopefully, we will see the day when the mentally ill, mental health professionals, educators, and society will be freed of the deterministic burden and free to accept personal responsibility for individual behavior.

Psychiatry and psychology are not scientific disciplines. How beneficial it would be if the professionals in both fields would concentrate their efforts where they are well qualified—identification of deviant behavior, assistance in coping with mental illness, and offering essential, unbiased support to those concerned for the mentally ill person. All of these efforts, please God, without the "Why?" It seems less than intelligent to ask when answers are known to be unavailable—a waste of money, a waste of energies, a waste of time, devastating in all respects.

Trial psychiatric testimony should be limited to identification of deviant behavior.

Thank you.

Senator **HEFLIN**. Thank you, madam. We appreciate your appearance here, and your testimony, and I think you give a very proper and excellent, analyzed presentation of things that we ought to consider.

I appreciate it very much.

I am going to call now on Senator Steve Symms to come forward, and to introduce the Honorable David Leroy, the attorney general for the State of Idaho.

STATEMENT OF HON. STEVEN D. SYMMS, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator **Symms**. Mr. Chairman and Senator Heflin, I am delighted to be here this morning, and I thank you very much for making this time available to myself and to our attorney general, David Leroy.

I want to commend you and other members of the subcommittee for the attention and study that you are giving to the matter of insanity defense reform. I think that the recent verdict in the Presidential assassination attempt of John W. Hinckley has caused a national expression of outrage and dismay. I have certainly heard it, and I am sure that you have. Americans from all walks of life have registered their feelings of shock and disbelief concerning the decision of the jury in this case.

Because the *Hinckley* trial was of such national interest, and the results of the trial such a violation of justice and commonsense, it has served as a focal point for an expression of national dissatisfaction. Yet the result of the *Hinckley* trial is not the root cause of this dissatisfaction. The *Hinckley* verdict only served to coalesce a basic national feeling that something is wrong in our country's criminal justice system, of which the insanity defense is but one small facet.

Americans view the result in this case as typical and representative of a system gone awry and no longer in the interests of society.

I can tell you from being in Idaho last week that the constituency in my State expressed their concern for not only the need for reform in the insanity defense, but also the need for reform in the apprehension, arrest, bail, sentencing, and parole of violent criminals.

I am hopeful, Mr. Chairman, the *Hinckley* trial will serve to provide the momentum necessary to reach such needed beneficial change in our criminal justice system. I have been following these hearings with great interest, and want to commend you, Senator Specter, for the manner in which you have approached insanity defense reform.

There is a fundamental deficiency in the modern insanity plea. The men and women of the *Hinckley* jury are not to be condemned for their decision in that case, because they were bound by the law, and the instructions given them by the trial judge.

It is the system, in my opinion, which we should change. As a minimum, any review of the law should consider who has the burden of proving insanity. It only seems reasonable that the one seeking to benefit by such a plea be required to show by clear and convincing evidence that indeed he or she was insane. But in this regard, the issue of insanity should not determine the issue of guilt or innocence in a charged criminal act.

In all but the rarest cases, we ought to assume that people, even people with mental problems, are responsible for what they intentionally do. Thus, it would only be at the sentencing, and not the trial stage, that the issue of insanity would be considered as a mitigating circumstance.

But the above changes, the shift in a burden of proof, and the time of consideration of the issue of insanity, while certainly positive steps, are not the key to reform. The key to reform is the definition of insanity itself. It is in this regard that the Idaho model has shown itself superior to all other proposals.

Because of the pressing need for quick action on this matter, I feel that the subcommittee may benefit from the experience and testimony of an individual who has spent a considerable amount of time working on this issue, and it is my pleasure to introduce Idaho's attorney general, Dave Leroy.

Idaho, sometime ago, recognized the need to reconsider its statutes governing the insanity plea, and Dave was a major force in this consideration. It was his office that provided the research, thought, and development of the new insanity defense law. His work has generated widespread awareness and support for this reform, and I am pleased that Idaho recently made these changes part of our State code.

We feel that we have set an example, and I hope the Congress will, in some manner, follow Idaho's lead by quickly adopting similar insanity plea reform.

Again, I want to thank you for the opportunity to be here, Mr. Chairman, and I look forward to hearing from our attorney general, who is a young with whom I have certainly been very proud to be associated with in my State. He is a graduate of the University of Idaho.

When he was elected as attorney general he was the youngest attorney general in the history of Idaho, and also is presently the youngest attorney general in the Nation. He was the Ada County prosecutor, which in terms of population is the biggest county in Idaho. He, however, has not always spent all of his time on the prosecution side of cases.

After graduating from the University of Idaho, and the University of Idaho Law School, he studied at New York University, where he obtained a master of law degree in trial practice and procedure. Following that he worked for 2 years for the renowned defense attorney, Henry Rothblatt, in defense cases, so he has had experience on both sides of the courtroom. We are very proud to have him as our attorney general in the State of Idaho. He presently is engaged in another political effort, being the candidate of the Republican Party for Lieutenant Governor of the State. I certainly hope to see him continue providing valued leadership to our State.

And with that, I would like to introduce David Leroy.

Senator SPECTER [presiding]. Senator Symms, it is a pleasure to have you with the committee this morning. During the course of the past year and a half, when we have served in the Senate together, it has been very pleasant to work with you on many, many subjects.

I think it worth noting that, coincidentally, yesterday evening, at about 6 o'clock, in the modest Senate gym, Senator Heflin and I had a protracted discussion about the insanity defense, and Senator Heflin and I both have the disadvantage of having substantial experience as lawyers, which is an impediment that has not yet crossed Senator Symms' experience.

So Senator Heflin and I were——

Senator **Symms**. I may be the only Senator that majored in horticulture. [Laughter.]

Senator **Specter**. And a few other choice subjects, Senator Symms, but the discussion yesterday afternoon was very enlightening.

Your comments today were direct and pointed, but yesterday afternoon they were even more pointed and more direct. We appreciate your being here. We know your schedule is a very, very busy one, and you are, of course, free to excuse yourself whenever you choose, but we are pleased that you have presented Attorney General Leroy here today.

We welcome him here. He is certainly an innovator, having brought the legislation to Idaho, as a model to the new approach to the insanity issue, and that is, of course, a very timely matter now with the *Hinckley* verdict being so current.

So we welcome you here, Mr. Attorney General, and look forward to your testimony.

STATEMENT OF HON. DAVID H. LEROY, ATTORNEY GENERAL FOR THE STATE OF IDAHO

Mr. **Leroy**. Mr. Chairman, Senator Symms, it is a pleasure to have an opportunity to make a brief statement, and respond to the several questions of the Chair and the Senator today on such an important topic.

Effective July 1, 1982, on the statute books of Idaho, we have adopted a new law that effectively eliminates the ALI insanity defense by embracing the following two tenets in the new section of our law. The two provisions are: "Mental condition shall not be a defense to any charge of criminal conduct." And, "Nothing herein is intended to prevent the admission of expert evidence on the issues of mens rea, or any state of mind which is an element of the offense."

Those two definitions, Mr. Chairman, are essentially similar in the procedural framework which they set up, and the wording which they use to House bill 6673, introduced by Congressman Myers of Indiana, but they contain a number of other features, and which we would commend to the attention of this committee, and intend to recommend to the attention of Congressman Myers, as well.

Essentially, the Idaho statute sets up eight features. No. 1, it abolishes the modern insanity defense. No longer will the jury be concerned in Idaho with the guessing of whether or not historically the defendant appreciated wrongfulness of his act, or had capacity to conform to the requirements of law.

Second, it preserves, as do all of the approaches that you are considering, the threshold constitutional right to be competent to stand trial, and to appreciate the nature of proceedings against oneself.

Third, we believe that it correctly and constitutionally preserves the right of the jury trial on the narrow guilty mind intent issue.

We recognize, as does our Constitution, that all crimes are union of act and intent, and all of the guilty as found by juries must be guilty of all of the elements of their crimes.

We allow, therefore, under the construction I have outlined, mental proof and pyschiatric testimony, on the ability to form the intent, and on the elements of a crime to the extent that mental condition is an element of the crime.

We believe, Senator, Mr. Chairman, that the Idaho approach provides a much narrower, much more predictable, much better, related-to-medical-concepts opportunity for psychiatric testimony.

Fourth, Mr. Chairman, the Idaho concept presents the jury with only two possibilities. Guilty, all elements proved, or not guilty, the case not proved. Culpability remains a jury issue, but it is not any longer possible under the Idaho approach to make special jury findings; such as either guilty but mentally ill, or not guilty by reason of insanity. Each of those possible special findings in my opinion, Mr. Chairman, and Senator, causes additional problems that you must grapple with on the question of the day, as you have outlined it.

Fifth, we move the broader issue of mental condition to the judge for consideration in sentencing. By specific provisions of the statute, the court then has authority to receive and hear any and all psychiatric testimony, including notions of wrongfulness or irresistible impulse, or others.

The judge specifically, under the Idaho statute, has the authority to place with the department of corrections, the defendant for referral to health and welfare department mental facilities during the period of any confinement.

Sixth, Mr. Chairman and Senator, the Idaho bill eliminates the automatic commitment on acquittal provision of our current criminal law.

Mr. Chairman, seventh, it also provides for a defendant who is convicted and serves time, if the judge does find a mental impairment not amounting to an inability to form intent to commit a crime, that if the defect is cured during a period of that criminal incarceration, then the individual is returned to the general prison population, eligible for parole, or other considerations, as any other inmate.

If the defect is not cured, but the sentence is served, and the defendant "tops out," then the defendant is released subject potentially to the civil commitment procedures which are provided in a separate section of our statute.

Mr. Chairman, as you framed the question which this committee would like to consider in specific today, regarding procedures that would constitutionally permit detention after acquittal, or after dangerousness has passed, we believe that the Idaho approach offers a number of advantages.

We favor, as I have outlined, and as we have done in Idaho, eliminating the automatic commitment on acquittal provision, supporting instead a separation of the criminal process and civil process.

As I have outlined it to you, under the Idaho bill, the criminal who is convicted is confined during and after any period of dangerousness, if such a period is passed while the defendant is still serving the criminal sentence. If dangerousness is eliminated, as estimated by mental authorities, the defendant merely remains in custody, and continues to complete his sentence.

If, however, the defendant is acquitted, or in fact never brought to trial at all, for one reason or another, we have as most States do, civil commitment procedures that provide for commitment during the period of dangerousness only.

Our Idaho test for involuntary civil confinement is that period of time during which the judge finds the defendant to constitute a danger to himself or others.

I note that some of the Federal bills that you are considering also add another dangerous concept, talking about "substantial risk of serious damage to the property of another." This might indeed be a sensitive area. We would not favor the creating of a Federal civil commitment procedure. I do feel, on behalf of myself as an attorney general, on behalf of the National Attorney Generals Association as a member of its board of directors, that the State attorneys general of this country, would be interested in working with you in providing a backstop and a uniform framework within the States for receiving referrals from the Federal courts, if the automatic provision of transfer of an acquitted Federal defendant to the State civil process is needed.

Mr. Chairman, I would therefore urge that this committee do just what it has begun to do: Consider Federal legislation. I would urge that you consider legislation which eliminates the ALI insanity defense as a definition and jury issue at trial. I believe that it would be wiser for this committee and the Congress to pursue legislation which avoids, or minimizes burden shifting to the defendant at trial, although I recognize, Mr. Chairman, that you have done some leadership work in that area. Third, I would feel that any bill which is produced that eliminates special verdict types, either guilty but mentally ill, or not guilty by reason of insanity, is an advantage rather than a disadvantage. To the extent that the issues can be minimized, narrowed, focused on a defendant's intent before the jury, then much of the psychiatric spectacle and battle such as we saw in the *Hinckley* case is eliminated.

I would also feel that this committee might well consider elimination of the automatic commitment upon acquittal provision, as I have outlined, by cleanly separating civil commitment and criminal procedure.

Mr. Chairman, I am honored, to have the invitation of this committee to appear and to testify. I would be pleased to respond to your questions.

Senator SPECTER. Thank you very much, Attorney General Leroy. We appreciate your being here, and appreciate your testimony. How long has the new statute been in effect in Idaho?

Mr. LEROY. Mr. Chairman, I can report to you that we have had all of 13 days worth of experience with the bill effective July 1, 1982 on the books. However, we adopted it by legislative deliberations after 3 years of study.

The legislature actively considered it in January and February of this year, when it was passed, and it was signed into law in March.

Senator SPECTER. So there has not been any opportunity for the test case to apply this statute?

Mr. LEROY. There has not been, sir, nor a declaratory judgment sought before its effective date.

Senator SPECTER. So there has been no legal determination on the issue of constitutionality in the application of any of principles?

Mr. LEROY. That is correct.

Senator SPECTER. Do you think that there is any constitutional problem which the statute faces in terms of having taken the novel approach of eliminating insanity as a defense?

Mr. LEROY. Mr. Chairman, I have advised the Idaho Legislature and the Governor that in my opinion, the bill is constitutional. I, as a lawyer, recognize that there is no guarantee that any future court, in some application, might find even the most staid of statutes subject to some constitutional doubt.

But I do believe that we have gone to school well on the attempts by three States earlier in the century to greatly modify or eliminate the insanity defense.

Mr. Chairman, the State of Washington, in 1908, in the State of Louisiana in 1928, and the State of Mississippi in 1930, all attempted, by different and various means, to eliminate the insanity defense. We took a good look at those cases, and concluded that the way that they set up a lunacy commission instead of a jury or abolished all of the evidence of any kind on mental condition or mental intent or absolutely outlawed any kind of mental disease or defect as a defense in a homicide case, in various ways, and various constructions, were things which we could avoid by the Idaho approach that we have taken.

Senator SPECTER. What was the consequence of the efforts in those three States?

Mr. LEROY. In each of those States, the State supreme court invalidated the legislation as unconstitutional on Federal and State grounds.

Senator SPECTER. Attorney General Leroy, how do you believe that the procedures will play out? You contemplate having psychiatric evidence on the issue of mens rea?

Mr. LEROY. Yes, sir.

Senator SPECTER. So that a psychiatrist would be in a position to testify under your statute that the mental condition of the defendant was such that he could not form the requisite criminal intent?

Mr. LEROY. Yes.

Senator SPECTER. Do you think that there will be a substantial difference as that evidence will come to the jury box, contrasted with the preexisting law?

Mr. LEROY. Mr. Chairman, I am informed by my own judgment and by the pyschiatrists with whom we worked, that there will be a substantial difference. It is my belief that in restyling the law as we have, and in focusing upon the defendant's capacity to form an intent, where intent is an element of the crime, that the psychiatric testimony will be shorter, it will be more consistent, that it is more properly related to medical concepts that the psychiatrists can test for and articulate in their own language, rather than the artificial legal test which we required psychiatrists to work with for many, many years.

My guess is, Mr. Chairman, that we will have less trial time devoted to that issue. The testimony will be less confusing to the jury, that psychiatrists with a greater degree of consistency will give the same kinds of conclusions, even though they may be hired by opposing parties at trial. Perhaps in that way, the trial process can be streamlined from time, money and jury confusion points of view.

Senator **Specter**. We have had two previous hearings, as you know. This is the third. At one of the hearings we heard from quite a number of psychiatrists, and the effort to find some common thread of definition of insanity as you apply the ALI standard, or the *M'Naghten* rule, the *Durham* rule, very, very difficult; really nonexistent.

We also had a hearing, shortly after the verdict in the *Hinckley* case. The verdict came in on a Monday evening at about 8 p.m., and Thursday morning we had five jurors who told us about their findings and impressions, which led to the conclusion that they understood very little of the nuances. In the context of what we heard in the *Hinckley* case, I wonder how you would see the definitions playing out. If you could give us an idea in a concrete way as to how the psychiatrists might testify on the mens rea issue, differently from say the ALI standard as to how there would be a practical difference in the formulation of the specific issue.

Mr. **Leroy**. Mr. Chairman, I think one of the things that this committee did very well was to invite the jurors to participate voluntarily to give the Nation an immediate posttrial impression and their reactions to working with the ALI insanity defense.

As a trial lawyer, having both represented defendants and having been a prosecutor, I can only guess, but you have shown very well how psychiatric testimony impacted the jury. My guess is, in talking about how Idaho's approach would practically work, that the psychiatric testimony would be more general. I would not, and we did not, in the Idaho law, prohibit as you suggest, by language in your bill, S. 2659, the psychiatrist, from giving testimony that presents or threatens an ultimate legal conclusion——

Senator **Specter**. Under your statute, the psychiatrist could testify, for example, that the defendant did not have the requisite state of mind to commit the act itself.

Mr. **Leroy**. That is right. We have not prohibited that as you have suggested it be done by your bill.

But my guess, Mr. Chairman, at a practical level is that many of the things that the jurors were talking about in the *Hinckley* case, the writing of letters, the thrust of poetry, the flying about the country wasting money, are more reflective of intuitive gut feelings and more consistent with allowing jurors to relate to questions of the intent than they are to sophisticated time of the crime questions of appreciating "wrongfulness," whatever that is.

Thus, my estimate, Mr. Chairman, would be that even though we would allow psychiatrists to testify on the ultimate legal conclusions of the defendant's capacity to form an intent on the crime, that that testimony would relate better to the practical terms and understandings that jurors would apply to the legal definitions as the judge instructed them.

Senator **Specter**. Just one more question before deferring to Senator Heflin. And that is, under your statute, the prosecution would have the burden of proof in the sense that the prosecutor must establish every element of the offense, one of which would be mens rea, criminal intent.

So that when the defendant comes in under your statute offers psychiatric evidence that the defendant did not have mens rea, requisite criminal intent, the judge would have the obligation under the Idaho law of charging the jury that it is up to the prosecution to prove beyond a reasonable doubt that the criminal intent or mens rea was present.

Does not that pose a significant problem that making it an issue of mens rea, where the burden is on the prosecutor, that you may have the same situation that was present in *Hinckley*, where if in doubt the jury says the elements have not been proved, the burden of proof being on the prosecution, we find for the defense?

Mr. **Leroy**. Mr. Chairman, neither you, I am sure, nor anyone would want to retreat at all from the constitutional requirement of proving all elements of crime beyond a reasonable doubt. It is merely a question of how we articulate getting to that point.

Senator **Specter**. Right. I do not think we could on the traditional standard of criminal intent. I think that is a part of due process and it would be a constitutional requirement.

Mr. **Leroy**. Yes, but——

Senator **Specter**. But it would be a matter of how it is structured and under your law, that burden stays with the prosecutor.

Mr. **Leroy**. That is correct and I believe that is where it should stay, Mr. Chairman.

The bill in Idaho was not pursued as a part of the Attorney General's legislative package to gain some undue advantage for the prosecution but merely to improve what has become, first in our State and then in many States, and then to national attention, a very, very seriously deficient process in our criminal law. We believe that if you reduce the complexity of the jury question to one of intent, that the prosecution will not suffer any debility or disadvantage by adhering to the traditional standard of proof beyond a reasonable doubt. That is the dynamic of our definition.

Senator **Specter**. Senator Heflin?

Senator **Heflin**. I apologize for not having read the Idaho statute. I have tried to look at it hurriedly here while I am listening, too. I still do not understand the details of your statute.

As I understand it, you have abolished the insanity defense but yet the jury plays a part in it.

Would you give us again as if you were teaching a freshman class in law school, the basic parts of your statute?

Mr. **Leroy**. Senator, and former Mr. Justice, I am sure that you in no way will retreat to freshman status.

Let me merely read those two quotations from our statute that set out the essential tenets with which I began my testimony.

"Mental condition shall not be a defense to any charge of criminal conduct." And, "Nothing herein is intended to prevent the admission of expert evidence on the issue of mens rea or any state of mind which is an element of the offense."

What we think that does, Mr. Chairman, is abolish the largely judicially created ALI insanity defense as it has existed in Idaho, but at the same time we emphasize that the prosecutor must prove all of the elements of a crime, including any mental intent germane to that crime beyond a reasonable doubt and reinforce that, retain as a jury issue, the right to hear all evidence that relates to those elements, including expert evidence that reflects upon them.

We think that is narrow enough to limit and improve the psychiatric testimony but at the same time broad enough to preserve the defendant's full range of constitutional rights.

Senator **Heflin**. In other words, what is the verdict of the jury? Either guilty or not guilty?

Mr. **Leroy**. Yes, sir.

Senator **Heflin**. And you just say you do not raise it by defense and the burden of proof stays the same?

Mr. **Leroy**. Yes.

Senator **Heflin**. The jury makes a determination of guilty or not guilty?

Mr. **Leroy**. Yes, sir, proved or not proved. The defense, of course, can attempt, as it often does, to raise reasonable doubts by various means, including psychiatric evidence. Of course that evidence must be relevant and material to the elements of the crime and we have indicated that by this statutory provision.

Senator **Heflin**. What you have done is to put the state of mind, the mens rea, in as a requirement of prosecution, changed that from whatever the existing law was, existing standard was before.

Mr. **Leroy**. Senator, for the most part we have merely reemphasized what was existing practice.

Senator **Heflin**. Well, suppose the *Hinckley* case had been tried under the Idaho statute, and it had come out that Hinckley was not guilty. What would be the societal reaction to that?

Mr. **Leroy**. Mr. Chairman and Senator, it probably could not be much worse than the societal reaction that we had in this country under the existing system in the worst case. I believe that the societal reaction would be that we have cleanly decided whether or not this defendant committed a crime, including having a mental intent to commit a crime. We then would proceed under the statutes that have been on our books since the 1890's in their present form essentially since 1951, by having a prosecutor file a civil commitment to a judge and retain the individual for the period of his dangerousness to society or himself as measured by physical injury. And that——

Senator **Heflin**. Well, now, your statute also goes into the civil commitment. Say he is acquitted and there is the issue of whether he had the necessary state of mind.

How does your treatment come in, your detention, your protection of society and for how long and what are those; give me those again?

Mr. **Leroy**. Mr. Chairman, the Idaho statutes on civil commitment are separate and apart from the bill. This bill was designed to relate with but not supersede or amend those statutes.

Essentially, the prosecuting attorney of the county files a petition before a judge urging that preliminary detention be had and that a hearing be held to measure this person's dangerousness to himself or others. He is referred to the State Department of Health and Welfare for a period of up to 4 months to do the testing required, after an initial hearing, and is subjected then to retention during the period of that dangerousness with periodic review, I believe on an every 6-months basis by the Department of Health and Welfare.

I think one advantage of separating the criminal adjudication from the civil commitment process is that we do not have this confusion back and forth of both systems working to the disadvantage of both systems.

In the criminal system, when the jury has an opportunity to consider "guilty but mentally ill," or "not guilty by reason of insanity," I think, and some of the testimony that you heard, as I understood it to be reported, hinted that it may be easier for them to fall into that third category verdict, because of the mistaken impression that a defendant will be retained under civil authority automatically or for long periods of time, periods of time that might have been consistent with his isolation from society had he been convicted.

By the same token, it has been reported in national news magazines and other sources that the personnel now at St. Elizabeth's Hospital probably will not be able to cleanly determine on the basis of the legal language of their tests "dangerousness," the period during which Hinckley should be retained, without some reference to that public reaction that you are talking about, which really should not be a part of the civil system as that system is presently constituted.

Thus, we think that cleanly dividing the two gives the public a greater understanding, appreciation, logic, justification after the fact, even after an acquittal, of the fact that the criminal process cleanly has run its course and if this defendant could not formulate an intent, then we ought to perhaps treat him in other ways in society.

I think the net effect of our division of those two, and the elimination of automatic commitment is that much of the frustration in law-abiding society would be lanced and eliminated rather than heightened as the present systems tends to do.

Senator **Heflin**. Now, under your separation of civil approach toward treatment and retention for society's protection, if in Hinckley's case under Idaho law he had been found not guilty then the prosection would have started a civil procedure.

What, under your law, would prevent Hinckley from walking about and being free? For a period of time until you could get such an order from the judge?

Mr. **LeRoy**. Mr. Chairman, nothing technically would prevent that except the swiftness with which the prosecution either in advance or after the fact moved. It takes about 10 minutes to prepare a petition and then of course the judge can move as swiftly as he can.

Senator **Heflin**. Does he have the right to have ex parte preliminary retention, detention remedies, then?

Mr. **LeRoy**. Yes, Senator, he does, and that would apply after hours and weekends and holidays as well. Judges are accessible for that purpose.

Senator **Heflin**. Well, you take 10 minutes, maybe the man walks out. And if he has lawyers with him who raise questions, and if you hold him, are you not then subject to habeas corpus in other proceedings?

Mr. **Leroy**. Senator, I acknowledge the theoretical possibility that a prosecutor would be unanticipating and unprepared for that consequence and therefore there may be a small window of time where that could happen. That is a theoretical possibility. But I think it is probably a better tradeoff to avoid the kinds of questions that this committee has been focusing on this morning. How can we detain someone after acquittal, if dangerousness is not an automatic or an adjudicated issue? I think the constitutional tradeoff to avoid those questions prefer a system like we have; that even with the minor theoretical possibility that you raise——

Senator **Heflin**. In your mens rea state of mind, I gather that you have all elements of the offense that you must prove. You have the element, we will say in a murder case, of the distinction between manslaughter and murder which is basically "with malice." Then you would place upon the burden and under your mens rea, all of the elements must be proven. Then under your situation, a person who has all of the appearances of the commission of first-degree murder could, because of his mental situation, be reduced down to a verdict of guilty on manslaughter. Now, there have been similar cases. This is not—at least I have not done all the research that I wanted to do on it, but there has been largely a few cases that have allowed this, but most of the States, as I understand it, have not gone into the various elements like the distinction between murder and malice being an issue of insanity or the issue of first-degree murder from second-degree murder being premeditation.

But under your mens rea approach, the burden would be on them to prove that he had the mental capacity to formulate premeditation and that premeditation had been formulated.

Mr. **Leroy**. That is correct, Senator.

Senator **Heflin**. Now, are you not opening up largely more and more use of insanity as a defense tool for lawyers and for psychiatrists than presently exists?

Mr. **Leroy**. Senator, I think not, because the burden is on the prosecution at present to prove all elements of the crime, including seeking determination of a finding of premeditation if that charge——

Senator **Heflin**. Well, I do not know where you are—did your Idaho court, prior to your change, allow the charges to the jury, to the effect that it did have the effect that the burden was on it to prove premeditation, it could reduce it?

Mr. **Leroy**. Yes, sir.

Senator **Heflin**. I know there are some States that have had it. But a great number of States have never gone that far; that the issue of insanity goes only to the issue of guilt and it has not been used in regard to the various elements.

How long have you had, in Idaho, the experience to file this change, of reducing various crimes to less offenses on the issue of insanity?

Mr. **Leroy**. Senator, I am not sure. I would have to check that and I will be glad to supply that to you.

[The following was received for the record:]

I indicated that I would provide, if available, the date of the earliest Idaho experience with the interrelationship of lesser included offenses and the insanity defense.

Although I have commissioned research in this area, I am not yet able to find a reported or unreported case which combines the two and provides a baseline date.

Senator **Heflin**. Did you have any experience with that?

Mr. **Leroy**. We have not litigated that issue by our Idaho Supreme Court, but I may be able to find out by consultation.

Senator **Heflin**. The mens rea concept to the various elements certainly opened up an area for plea bargaining I am not sure that the issue of plea bargaining and insanity should be permitted because we have seen a lot of the ills of plea bargaining; and I am worried that a mens rea will result in instances of convictions of lesser, included offenses where they should not be and also it would end up in a possibility of plea bargaining involved in this.

Mr. **Leroy**. Senator, I could speak from the Idaho perspective on that.

As Senator Symms mentioned, I practiced law in New York City for 2 years as a defense lawyer, and I have seen firsthand and taken advantage on behalf of clients, "too much plea bargaining" system. In a rural State like Idaho, where we process 250,000 cases a year, a very few of which involve the insanity defense, we do not have a problem with plea bargaining under the existing system and I would not anticipate that it would result under this law. Plea bargaining problems can either operate for or against society. In those areas where they operate against society, it is a function of the prosecution and the court merely having too many cases to give individual attention to an individual instance on a given day. I do not anticipate, although I think your observations, questions, are fair speculation that this will cause us plea bargaining problems in Idaho. I would hope it would not, for the Nation, should we choose to go in this direction.

Senator **Heflin**. Under your mens rea concept, there are a lot of offenses, well, say like receiving and concealing stolen goods, which is based upon the proof that the person had knowledge on some date when he should have known that the stolen item belonged to someone else or was stolen.

Now, under a mens rea concept, you would have the burden under this to prove upon its face, that he had the mental capacity to retain that knowledge or that he had the mental capacity as an element as to whether there was reason to believe that it was stolen.

Now, I am worried that the concept of mens rea, the state of mind will open up avenues for the defense, which would be directed to a very narrow point and which may in effect mean that the use of insanity plea will be used as a method to get people who are marginal off.

You will have many acquittals or not guilty by reason of insanity if you direct it to that.

If the case is marginal, well, say a prosecutor has to prove that the man has knowledge that the goods were stolen. It is true in many, many instances that that proof is difficult, but you can do it in a set of circumstances. If however, you inject into that element the element of insanity, it may give juries many more pegs to hang, justifying it for not guilty. All of these are questions that I have pertaining to the mens rea.

As you have written your statute, you have placed a burden on all elements and it would almost require the judge to charge a jury to the effect, did the defendant under these circumstances have the mental capacity to appreciate the knowledge that the item was stolen? It places an affirmative burden upon the judge in instructing the jury as to all of those issues and to the mental capacity involved.

Thus while the idea of mens rea is directed toward something that can be simple, it can also get into a quagmire of problems that could confront the criminal justice system.

Mr. **Leroy**. Mr. Chairman, Senator, you articulate a very sophisticated concern. I would hope, in four brief points I could alleviate that because you and I share the same objectives, in avoiding the kinds of consequences that you note, in a poor system, might flow.

First, the mental defense is not commonly used in a number of the crimes, one of which you mentioned as an example, for instance, receiving stolen property. The psychiatric problem, the employing of this defense commonly is in the most serious, sensational crimes, those involving aggression against another. The hypothetical that you raise is useful for discussion purposes. I think it need not spoil an otherwise appropriate system in a practical sense.

Second, our bill, by the language I read to you and indicated, creates no new element for any crime. We are merely working with those elements for every crime which are already on the books and have been tested, tried, and proved before judges and juries.

Third, what I think our bill does, Senator, rather than raise the relatively remote possibilities of inventive defense practices to refocus on intent and men rea to the extent that it probably is usually focused on in most criminal activities anyway, but substitute that focus for the focus that we have in the *Hinckley* case.

Finally, Senator, I would think in approximately the same form in which they are not issued, the simple direct common jury instructions relative to mens rea, and intent, would probably be more applicable than the creation of some sophisticated new devices for instructing the jury on the law.

If I am correct on that, then the judges will not be diverting the jury's attention in some of these areas that you raised. If I am correct in my assumption, as I think you heard testimony at a basic level, the jury is comfortable with working with concepts of "intent." If as I have predicted by the language that we drafted there are indeed no new elements for any of these crimes, then I am generally comfortable with working with concepts of intent. If as I have predicted by the language that we drafted there are indeed no new elements for any of these crimes, then I am generally comfortable that the sophisticated effect that you raise will not be a detriment for Idaho or any other system. I think some may test those fringes but I think they will not succeed.

Senator **Heflin**. I have a real question.

Take burglary. Take some of the common burglars. Some of the statutes have changed. The elements, breaking, entering, property of another.

Under your statute, the obligation would be on the prosecution that the person charged had the mental capacity to knowingly break, to enter, and if an obligation is based upon a judge to instruct the jury as to all of the elements, I think there is a lot of dangers that can develop from it.

It would seem to me that it would make it much more difficult to convict a person if that type of instruction is given and that type of defense is there. I just—I do not know; I have not made up my mind. I am worried about some of these things.

I have some questions that some of the various members of the staff have written out. One says, if an Idaho defendant is acquitted because the jury has reasonable doubt as to the defendant's capacity to formulate the mens rea, after the acquittal, is he free to go?

And I believe that was answered.

You say in 10 minutes you could get the thing out. I think you have got much faster typists in Idaho than in Alabama.

Mr. **LEROY**. I will pass that compliment on.

Senator **HEFLIN**. All right.

This question.

It says, guilty but insane would appear to be—would subject an individual to longer incarceration. Guilty but insane could then be used so infrequently as to mount a factor of abolishment of the defense. You are not advocating—you are not——

Mr. **LEROY**. No, sir. No, sir, we are not a guilty but insane State.

Senator **HEFLIN**. I think some people thought you were.

Did you get into any consideration of that guilty?

Mr. **LEROY**. One of the vehicles that was used to attempt to deflect our legislative approach was encouragement of that direction. Some people wanted to encourage an interim study committee, which after 3 years of thinking and studying seemed inappropriate to us. We did have representatives from the State of Michigan where that law is in effect come out to provide insight for us. The spokespeople that we had were somewhat negative about the Michigan experience under that statute, but I am not familiar with the approach.

Senator **HEFLIN**. Could you furnish us with the names of any individuals who are very knowledgeable, have done a lot of research and have tried to address the issue of constitutional impediment. To the verdict of guilty but insane?

Or to the verdict of guilty but mentally ill?

I would be interested in hearing from them on their various approaches.

Mr. **LEROY**. We will be glad to provide that to you.

[The requested material follows:]

I indicated that I would provide to the committee a list of persons familar with the "guilty but mentally ill" concept. Those persons are:

Norval Morris, Prof. of Law and Criminology, University of Chicago.
Elyce Zenoff, Professor of law, George Washington University, Washington, D.C.
David Robinson, Professor of Law, George Washington University, Washington, D.C.
Lois Shawer, Clinical Psychologist, California Medical Facility at Vacaville.
Alan Dershowitz, Professior of Law, Harvard Law School.
Raymond L. Spring, Professor of Law, Washburn University of Topeka.
Daniel W. Robinson, Professor of Law and Psychiatry, Georgetown University.

Senator **HEFLIN**. There is another question from a staff person. If punishment would not serve to deter a mentally ill person from committing a crime, then on what basis do we justify incarcerating the offender?

Mr. LEROY. Mr. Chairman and Senator, there are a number of theories behind incarceration of the penal facility. I think it is not the purpose of this committee today nor the purpose of the Idaho bill to sort out the many rationales and justifications behind incarceration. They are, of course, deterrence, rehabilitation, punishment, simple warehousing away from society. Sometimes those conflict, sometimes they compliment each other. It is our thought that the judge, in sentencing under the Idaho statute, sorts out and chooses between these rationales. He adopts an appropriate sentence that maybe merely warehousing, or perhaps some thought of retribution, or rehabilitation or deterrence and exacts some appropriate sentence.

Senator HEFLIN. There is another question from the staff. Since as you know your new law does not prevent expert testimony on mens rea, would you continue to see the experts give out new terms?

Mr. LEROY. We think it would be greatly narrowed and the new terms would be easier for the jury to consider. I think the expert evidence approach, which is similar to that, which the State of Washington tried in 1908, might in some applications run afowl of constitutional applications. I think the approach that we take preserves the right to jury trial, is probably preferable in practical results as well.

Senator HEFLIN. Thank you.

Senator SPECTER. Thank you very much, Attorney General Leroy. We appreciate your being here.

I would like to call the next panel, Dr. Henry J. Steadman, Bureau of Special Projects Research, New York State Department of Mental Hygiene; Dr. Stuart B. Silver, superintendent, Perkins Hospital; assistant secretary for forensic services, State of Maryland; Barbara Weiner, adjunct professor of law, Illinois Institute of Technology, Chicago-Kent; faculty, Rush Medical College, Cooke County Graduate School of Medicine; executive director, Isaac Ray Center, Department of Psychiatry, Rush St. Luke's Presbyterian Hospital, Chicago, Ill.; and James W. Ellis, professor of law, University of New Mexico, reporter, ABA task force on civil commitment of prosecuted persons.

Welcome, we appreciate very much your being here.

The question which we seek to focus on today, as you have heard it articulated, is what kind of detention might be possible, if any, after there has been a determination that a defendant is no longer a menace to himself or to the community? There is a subpart of the question which we would like this panel to address, and that is, is it realistic to have a standard of dangerousness to the community in the context that the predictability on expert evidence is so low in really telling us who is a threat to the community?

Let us start with you, Professor Ellis, if we may. Your experience on the task force on civil commitment of prosecuted persons perhaps gives you some unique insights into the question of the various factors which may be appropriately considered by the law as to continued detention, including the act for which a person has been acquitted by reason of insanity.

STATEMENTS OF A PANEL CONSISTING OF: DR. HENRY J. STEADMAN, BUREAU OF SPECIAL PROJECTS RESEARCH, NEW YORK STATE DEPARTMENT OF MENTAL HYGIENE; DR. STUART B. SILVER, SUPERINTENDENT, PERKINS HOSPITAL; ASSISTANT SECRETARY FOR FORENSIC SERVICE, STATE OF MARYLAND; BARBARA A. WEINER, ADJUNCT PROFESSOR OF LAW, ILLINOIS INSTITUTE OF TECHNOLOGY, CHICAGO-KENT; FACULTY, RUSH MEDICAL COLLEGE; ADMINISTRATIVE COUNSEL ISAAC RAY CENTER, DEPARTMENT OF PSYCHIATRY, RUSH PRESIDENT, ST. LUKE'S PRESBYTERIAN HOSPITAL, CHICAGO, ILL.; AND JAMES W. ELLIS, PROFESSOR OF LAW, UNIVERSITY OF NEW MEXICO, REPORTER, ABA TASK FORCE ON CIVIL COMMITMENT OF PROSECUTED PERSONS

Mr. ELLIS. Thank you, Mr. Chairman.

The uniqueness or quality of my insights will abide the event.

My name is James W. Ellis. I am a professor of law at the University of New Mexico. I currently serve as chairperson of the Legal Process Subdivision of the American Association on Mental Deficiency and as a reporter, as you have mentioned, for the American Bar Association's Criminal Justice Standards on Metal Disability Law, working particularly on the issue of subsequent civil commitment of defendants found not guilty by reason of mental disability. I want to make clear at the outset that I am testifying in my private capacity and not as a representative of my university, the American Association on Mental Deficiency or, more particularly, the American Bar Association or its Criminal Justice Standards Committee.

What I would like to offer to you today are some thoughts that I have had about the question of subsequent civil commitment of people found not guilty by reason of insanity and to suggest to you some of the difficulties that I think face legislators, whether Federal or State, in trying to cope with this problem.

Everyone agrees, and the courts have also agreed, as measured by the results of the cases that most persons found not guilty by reason of insanity are, as an empirical matter, and should be, as a prescriptive matter, confined following their acquittal; that confinement takes place in mental hospitals, and there is not much disagreement about that.

The procedures necessary to accomplish that confinement are substantially difficult, as I am sure your subcommittee has begun to encounter. There is a strong consensus among the courts that following the acquittal, and at least following an interim evaluation period to determine the defendant's current mental status at the time of acquittal, there must be a separate civil commitment hearing of some sort to give the State the power and the authority to hold the individual who has just been acquitted. It is in the nature of the insanity defense that the verdict was a not guilty verdict and the State then lacks power to hold that individual based on his previous act, except to the extent that that act and other data may suggest that the person is going to be dangerous in the future.

And thus what we are talking about, by and large, is the nature of the system by which that subsequent commitment can be sought.

Again, I would emphasize that the inquiry here is on the defendant's current mental state at the time of the subsequent hearing, rather than his mental state at the time he committed the act for which he was tried in a criminal court and that that current mental state is probative evidence only to the issue of what he is likely to do in the future.

You will hear from witnesses more competent than I to testify on this. These are extraordinary difficulties with regard to that evidence. But its purpose is to give the State the power to hold someone; they having lost that power through the jury's or the court's failure to convict.

Determining the procedures in that subsequent hearing and in periodic review and in release procedures, everything with regard to the subsequent confinement of a person acquitted by reason of insanity requires a delicate balance between the legitimate and manifest interest in public safety, which we are all experiencing now and justifiably so, and the individual liberty of someone who has been acquitted of the crime charged.

The court's—again, there is not unanimity here, but there appears to be a fairly strong consensus and strong authority that somewhat different procedures are permissible for persons who have just recently been found not guilty by reason of insanity, than the State may employ or has chosen to employ for ordinary civil commitment patients, people who have not been charged with a crime, but who have been brought before the court with the intent of committing them, either for mental illness or for mental retardation.

The courts—there have not been a sufficient number or variety of cases to give us a fall view of what differences are permissible, particularly under the equal protection clause of the 14th amendment—and the due process clause of the fifth, when we are talking about the Federal Government—but we know that some differences are possible.

In the course of considering this matter, in preparing what are now draft standards of the criminal justice standards project, we have been trying to cope with what differences exist between persons found not guilty by reason of insanity and ordinary civil commitment patients that would justify different kinds of procedures. Thus one possible system which might be considered is one which largely tracks the general civil commitment system of the States but which has two or three differences.

One difference which it seems to me could be justified on the basis of the differences between the two classes of people would be that it can be argued that periodic review, which the courts have increasingly held must be provided for civil commitment patients, can be less frequent, especially early on, for people found not guilty by reason of insanity, and that the procedures for periodic review may not need to be identical to those for other mental patients.

More important, but not unrelated, is that it can be argued, I think strongly, that the release procedures at what may be the end of a person's confinement, may be different for a person acquitted by reason of insanity from the ordinary civil patient.

Increasingly—and I think now widely among the States, the order of a court is not required for the release of an ordinary civil patient. The superintendent of a facility which is housing someone who has been committed by a State trial court, generally under the statutes now, has the authority to release that person when the superintendent or his delegate determines that person no longer needs to be there, does not meet the commitment criteria, will no longer benefit from the treatment they have to offer, or whatever.

It seems to me arguable, and I think correct, that with regard to people who have been acquitted by reason of insanity, that the State may have sufficient justification to require a more rigorous release procedure and in particular, referral back to a court—most likely the committing court—to authorize that person's release rather than allowing the superintendent to do that on his own.

Senator **Specter**. On the issue of release, are there standards other than dangerousness to himself and the community?

Mr. **Ellis**. I think that there cannot be a standard less rigorous than dangerousness to others.

Senator **Specter**. Is there any other standard used by any other jurisdiction aside from that one?

Mr. **Ellis**. Not that I know of. Those statutes have been gathered in a Note in the Harvard Law Review,[1] to which your staff has access, and those statutes can be surveyed. I do not know of one now that uses something other than one of the various formulations with regard to prospective dangerousness.

Senator **Specter**. I am told that Professor Weiner might have the answer to that particular question.

STATEMENT OF BARBARA A. WEINER

Ms. **Weiner**. Yes. In fact, I have with me all the State laws dealing with the discharge issues and I will be addressing that, but there are now a number of States that require before someone is discharged, it is reviewed by the criminal court judge that has heard the original case and usually the standards are not the same as the civil commitment standard.

I have explained this in my statement——

Senator **Specter**. What are those standards?

Ms. **Weiner**. Generally, depending upon the State, the State may require for discharge, that the court has to be convinced that this individual can be safely discharged in the community or something vaguer. You do not have to prove the same level of standard as you would at the civil commitment hearing and I do not know if you want me to get into this now, but I try in a very organized fashion, in my testimony, to explain the problems with the present system and how they can be justified, and I have attached to my testimony a number of cases that have distinguished the NGRI individual from other civil committees.

---

[1] Note: Commitment following an insanity acquital, 94 Harv. L. Rev. 605 (1981).

Senator **Specter**. All of your written testimony will be made a part of the record but it will facilitate our proceeding here if you would give us an illustration, an example of that at this time.

Ms. **Weiner**. OK.

I think an example I would use is our law in Illinois, which I think is a good one, since I helped in drafting it. When the criminal court is faced with the discharge decision after the person has been hospitalized, the decision is not just based on whether this person presents a danger to others or to himself, but it is a broader decision of whether this person no longer needs inpatient care in the hospital; and that is the phrase we use. And if he no longer needs inpatient care in the hospital, which is much broader than the civil commitment standard in every State, then some type of outpatient program can be ordered.

And Illinois is not unique in that.

[The prepared statement of Ms. Weiner and an article by Ms. Weiner from the Chicago-Kent Law Review follow:]

PREPARED STATEMENT OF BARBARA A. WEINER

Disposition of the Person Found Not Guilty by Reason of Insanity

Thank you for giving me the opportunity to testify before these hearings. I come not only with an academic interest in the insanity defense, but also with six years of practical experience in having worked in situations which treated the NGRI acquittee. Presently, I run, with James Cavanaugh, M.D., the Isaac Ray Center which is part of the Department of Psychiatry of Rush-Presbyterian-St. Luke's Medical Center in Chicago. This Center specializes in providing outpatient treatment to the person found not guilty by reason of insanity. Previous to our opening the Center I was a staff attorney to the Illinois Department of Mental Health and Developmental Disabilities and my responsibilities included interaction with the criminal court on all issues relating to mentally ill offenders. I think these experiences give me a unique perspective on the problems posed by the insanity defense.

As a result of the Hinckley case, and a few other notorious cases each year, the public is under the impression that numerous people are "getting off" with the insanity defense. This is of course completely untrue. Few people raise the insanity defense and fewer raise it successfully. For example, in Illinois, during the past year out of 25,000 felony cases which went to trial 48 people were found not guilty by reason of insanity. For brevity, I will refer to these people as NGRI individuals. 41% of those successful pleas came in murder cases and another 21% in attempted murder cases. After a case like Hinckley the obvious question raised by legislators, the media, and the public is what can be done to assure that this person does not commit such a terrible act again.

This issue is not new. Periodically in a state an individual who was found NGRI will be discharged from the hospital and then go out to commit another serious crime, such as a murder. This will lead to calls to abolish the insanity defense, enact a guilty but mentally ill law, or find some way to assure that this doesn't occur again. Part of the reason this has occurred is because in the past when someone was found NGRI they were presumed locked away forever in the state hospital for the criminally insane. With the patient's rights movement of the 1970s, NGRI's were discharged to the community like other civilly committed persons. Some of these NGRI's should never have been found not guilty but the prosecutors accepted such a plea feeling they would be locked away, and thus the public was protected. Once discharged an extremely small number of these people (much lower than the recividist rate for people on parole or probation) would recommit crimes, either because they were bad people, or because their illness was not under control.

The issue which I have been asked to address by this committee relates to what can be done to protect the public from the person found NGRI. Although I can suggest the obvious answers to protecting the public, such as banning the sale and manufacture of ammunition and handguns which kill 30,000 people a year, I will limit myself to the specific problems presented by the NGRI individual. We are probably talking about around 1,000 people a year who are found not guilty by reason of insanity. Of these between 40 - 60% of the cases were murder or attempted murder cases, often involving family members. The other cases range the gamut from theft to armed robbery. Most of the cases are of such little consequence that there is no contested trial, and no media attention. Only the high profile cases receive the media attention: those where the public is offended that the insanity defense can be raised, such as where someone shoots the President in front of 120 million television watchers, or where the person is caught with 33 bodies in his basement. Most of these high profile cases are raising the insanity defense because there is no other defense to raise. Usually they are unsuccessful, such as John Gacy, the Hillside Strangler, and Mark Chapman.

Once raised successfully the present laws in many of the states and within the federal system raise many barriers which make it difficult if not impossible, for the criminal court judge to assure that the public's safety will be protected if this NGRI individual is released. The present system presents four major problems: (1) the NGRI individual must meet the civil commitment standard, (2) the court is limited to either civil commitment or discharge; (3) in most states there is no option for court imposed outpatient treatment; and (4) there are no provisions for review of the hospital's discharge decision.

The federal system has the most problems, in the sense that if someone is found NGRI he would be considered not guilty and might be able to walk out the door of the courtroom depending on the state, with no further evaluation or follow up care. Fortunately, the insanity defense is infrequently raised in federal cases, since most cases do not deal with violent acts, but acts which require more rational planning such as tax fraud, mail fraud, drug dealing or bank robberies. However, had John Hinckley committed his crime somewhere other than D.C. it is possible that he would have walked out the courtroom door when the jury found him not guilty and he might not been civilly commitable in the state where the crime occurred.

I have attached my law review article which details why these four areas present problems. I would like to now address the issue of how can both the federal and state government's best assure the public that the person who has been found NGRI, when released to the community will not repeat his criminal behavior. Before describing these ways, I think legislators and the media need to be educated and help educate the public about how rarely the insanity defense is used and used successfully, how extremely unlikely it is that this person will repeat his violent behavior, and how mental illness, like heart disease and diabetes, can be treated but not cured. I have four suggestions for changing the present system:

1. There Must Be a Broader Standard For Civil Commitment. The NGRI individual would still be entitled to the same procedural protections as the civil committee but the fact of his violent activity would have to be considered when making the civil commitment decision. This is important because the basis for civil commitment is either dangerousness to self or others or inability to care for oneself due to a mental illness. Many states require that the dangerousness appear immenient or likely. Usually the NGRI individual committed the act more than a year before being

found not guilty. He has often been under psychiatric hospitalization, usually as a result of being incompetent to stand trial, and now is no longer exhibiting the same symptoms of his illness which lead him to commit his act. Thus, if he is rational enough to be competent to stand trial he will be unlikely to meet the civil commitment standards of most states. Although many states provide of an automatic commitment after an NGRI finding, it is for evaluation purposes to determine if the person meets the civil commitment standards.

2. The Criminal Court Which Heard The Case Must Review The Discharge Decision: Frequently the staff of the mental hospital may not be aware of any or all the facts of the case. The economic realities of the state mental health system, places the emphasis on returning people to the community. This has resulted in discharge planning the moment someone enters the hospital. It is critical to have someone who is not under these economic pressures, who is aware of all the facts of the case, approve the discharge decision. This would be done after knowing what treatments the person has received, and what has been arranged to assure that this individual will succeed in the community. Although some states require court review, it may not be by the criminal court, but by a mental health court which is not familiar with the facts of the criminal case.

3. The Court Must Have The Ability To Order Mandatory Outpatient Care: For most mental patients the key to their successful return to the community appears to be continuation of their medication. Someone needs to be watching them to assure that this is happening. It can't be a parole officer, but must be a mental health professional who is familiar with all the facts of the case, and can identify when the patient is deteriorating and may need rehospitalization. Not only must the court have available the option of outpatient programs, or alcohol and drug rehabilitation programs, but it also must have continuing jurisdiction over the person for some number of years after discharge. In those states which specify mandatory outpatient care the common number of years appears to be five.

In our program in Illinois, the Isaac Ray Center, which was specifically created to treat the NGRI individual, we feel the court order is an essential element in achieving patient compliance with treatment. Our patients know if they don't keep their appointments or take their medications they may be subject to court imposed sanctions. These could include being held in contempt for not following the court order, and spending time in Cook County Jail. On the very few occasions when we had to resort to reintervention by the Court, I felt we properly balanced the public's safety against the rights of the patient.

4. Development of Specialized Programs For Treating Mentally Ill Offenders: Few states have specialized programs for treating mentally ill offenders. Thus, if there is a requirement for outpatient care it will usually be to the closest community mental health center. This staff will not have the experience in dealing with the mentally ill offender and understand the legal ramifications of his status. Their primary responsibility is to the patient, rather than having a dual responsibility to the public and the patient, which is the situation at the Isaac Ray Center. Our staff is experienced in dealing with mentally ill offenders. We are used

to interacting with all aspects of the criminal justice system. We err on the side of conservatism in our treatment. We immediately move for rehospitalization when it appears appropriate - which is true in 25% of our cases each year. We feel we have created a balance between protecting the public and serving the needs of the patient. As a result, Criminal Court Judges in Cook County know that if they discharge a patient to our care, he will be carefully monitored and the Court will be notified when their intervention is necessary.

The specialized programs I am proposing are feasible in any urban area. The cost of such a program would be about $3,000 per year per patient, as compared to between $20,000 and $30,000 if the person remained hospitalized. Since our Center has opened, none of our patients have engaged in violent criminal behavior. In Illinois, since the Court has reviewed the discharge decision, there has not been one case of a person who has been found NGRI who was discharged and committed another violent act.

These ideas which I have suggested are placed in the form of model legislation which is set out in the attached law review article. I have also attached a copy of the Illinois statute which embodies most of the principals I have expressed. The issue then becomes whether these goals which provide different commitment standards and discharge procedures for the person found not guilty by reason of insanity can withstand constitutional attack as a violation of the Equal Protection Clause of the Fourteenth Amendment. The attorney for the NGRI individual will argue that his client is being treated differently in three ways: (1) he is committed under a broader standard; (2) the discharge of the NGRI individual will be subject to court review, while for other civilly committed persons this is not the case; and (3) the Court will be able to order outpatient treatment for a specific period of time. In my law review article, I lay out the arguments which will be raised by the attorney for the NGRI client in support of not permitting differentials in treatment. I don't think these arguments hold up, and that states can and, have justified such differentials in procedures for the person who has been found not guilty by reason of insanity.

The Equal Protection Clause does not require treating all persons alike, only that any distinctions between groups of persons be made on a rational basis. In the case of the person who has successfully used the insanity defense, you are faced with an individual who has admitted that he has committed a criminal act, usually violent. It has also been accepted by a court, that he was mentally ill. I have attached to my testimony a list of recent cases in which courts have made distinctions between the NGRI individual and other patients, and found the distinctions acceptable. These cases involve accepting (1) automatic commitment for someone found NGRI for evaluation purposes, (2) using different standards of proof when civilly committing the NGRI individual, and (3) cases which have approved different release procedures for the person found NGRI as compared to other civilly committed persons.

Probably one of the best analysis of why the NGRI person can be treated differently, at least in terms of release, was provided in U.S. v. Ecker, which was decided by the Circuit Court of Appeals for the District of Columbia. That court recognized that the dangerousness demonstrated by the commission of a crime and acquittal by reason of insanity was a rational basis for the disparity in release provisions.

More recently the Second Circuit in Warren v. Harvey affirmed the use of a different evidentiary standard when committing someone who has successfully used the insanity defense. The Court said:

> The obvious difference between insanity acquittees and other persons facing commitment is the fact that the former have been found, beyond a reasonable doubt, to have committed a criminal act. Insanity acquittees thus have "proved" themselves a danger to society at one time. Nonacquittees, in contrast, have not been found by any factfinder to have harmed society as a result of their mental illness. This difference, we believe, gives rise to considerations which justify a lesser standard of proof to commit insanity acquittees than to commit other persons.

The trend in the states appears to be to recognize the rational basis for differentials in treatment. I think that should a law be enacted which provides a broader standard of commitment, and requires court review of the discharge decision, and the option of ordering mandatory outpatient treatment most courts would uphold these laws. The policy of the courts is the recognize decisions made by the legislatures as long as they have some rational purpose. I think that the distinction between the person found not guilty by reason of insanity and all other persons is rational. Unlike others who were found not guilty, these people were only found not guilty after admitting that they committed the physical act. They admitted that they had a mental illness at the time of committing the act, so there is no question of a mental illness. The justification for broader standards of commitment is that based on their past history, we know the individual's mental illness might manifest itself in a violent fashion. The justification for mandatory outpatient care is that it has been well documented that the way to keep mental patients from showing signs and symptoms of their illness again is to have them continue their medication and be in treatment. Society has a special interest in assuring that someone who has manifested his illness in a violent manner remain in treatment, so those aspects of the illness will not reoccur and put society in danger.

We have now had our revised law in Illinois since 1980. It seems to be working well. The challenges which have been brought have been rejected by the Court. The opening of the Isaac Ray Center provided a specialized program to deal with the difficult issues presented by the mentally ill offender. I think legislation on both a federal and state level similar to what I have proposed, and Centers similar to the Isaac Ray Center, will go a long way toward making the public and the courts feel comfortable with keeping the insanity defense. After all, even if the defense were abolished, who would be watching these individuals once they are released from prison?

APPENDIX TO TESTIMONY OF BARBARA A. WEINER

Cases Which Have Upheld Differentials In Treatment of the Person Found Not Guilty By Reason of Insanity

1. Cases Which Have Upheld Automatic Commitment
    a. In re Jones, 612 P.2d 1211 (Kan. Sup. Ct. 1980)
    b. California v. Froom, 166 Cal. Reptr. 786 (Cal. Ct. App. 1980)
    c. California v. Salas, 165 Cal. Rptr. 82 (Cal. Ct. App. 1980)
    d. Clark v. Georgia, 266 S.E. 2d 466 (Ga. Supt. Ct. 1980)
    In re Torsney, 394 N.E. 2d 263 (N.Y. Ct. App. 1979)
2. Cases Which Have Upheld Different Standards of Proof for Commitment
    a. Thompson v. Yuen 623 P.2d 881 (Haw. Supt. Ct., 1981)
    b. Warren v. Harvey, 632 F.2d 925 (2nd Cir 1980)
    c. Alaska v. Alto, 589 P.2d 402 (Alaska, 1979)
3. Cases Which Have Approved Different Release Procedures
    a. Jones v. U.S., 432 A. 2d 364 (D.C. Ct. App. 1981) - not entitled to automatic release after being detained beyond the maximum period he could have been imprisoned.
    b. U.S. v. Ecker, 543 F.2d 178 (D.C. Cir., 1976)

NOT GUILTY BY REASON OF INSANITY: A SANE APPROACH

BARBARA A. WEINER*

For more than two decades, the legal literature has been filled with articles on the insanity defense.[1] Discussion has centered around the standard used to excuse someone from criminal responsibility,[2] whether the defense should be abolished,[3] and whether the defense is being overused.[4] In recent years, a number of states have discussed changing their laws relating to the insanity defense. This article will review the historical background of the defense and will explore the present state of the defense in the United States. Problems with the procedures after being found not guilty by reason of insanity[5] will be examined and model legislation will be presented to correct those problems. Finally, the article includes an analysis of why due process and equal protection are not violated by treating the NGRI individual differently than other civilly committed persons.

DEVELOPMENT OF THE INSANITY DEFENSE

Today in the United States, the insanity defense is recognized in every jurisdiction as an affirmative criminal defense.[6] This defense can be raised whenever intent is an element of the crime. By pleading the insanity defense, the defendant is admitting that he has committed the act that he is accused of, but is stating that because of his "insanity" he

---

* Administrator and Counsel to the Section on Psychiatry and Law, Department of Psychiatry, Rush-Presbyterian-St. Lukes Medical Center; operates the Isaac Ray Center, an outpatient program for persons found not guilty by reason of insanity. J.D., De Paul College; B.A., University of Maryland.

[1] *See, e.g.*, Monahan, *Abolish the Insanity Test?-Not Yet*, 26 RUTGERS L. REV. 719 (1973) [hereinafter cited as Monahan]; Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968) [hereinafter cited as Morris]; Goldstein & Katz, *Abolish the "Insanity Defense" - Why Not?*, 72 YALE L.J. 853 (1963) [hereinafter cited as Goldstein & Katz]; H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979); H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY (1972).

[2] *See, e.g.*, A. BROOKS, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM (1974); A. GOLDSTEIN, THE INSANITY DEFENSE (1967) [hereinafter cited as GOLDSTEIN].

[3] *See, e.g.*, Monahan *supra* note 1; Goldstein & Katz *supra* note 1; Brady, *Abolish the Insanity Defense — No!*, 8 HOUS. L. REV. 629 (1971).

[4] *See, e.g.*, Morris *supra* note 1.

[5] Hereinafter sometimes referred to as NGRI.

[6] *See* Appendix A.

Reprinted from
CHICAGO-KENT LAW REVIEW
Volume 56, 1980, Number 4
Copyright 1980, Illinois Institute of Technology/Chicago-Kent College of Law

could not form the requisite mental state, the intent which is a crucial element of the crime.

The recognition that crimes are based on the existence of a mens rea/mental state, as well as an actus rea/physical act, goes back more than three thousand years.[7] The Hebrews made a distinction between intentional and unintentional crimes, and neither children nor insane persons were held criminally responsible for their acts, nor did they have to compensate their victims.[8] The Greek philosophers, beginning with Plato, recognized that individuals had a free will which made it possible for them to be responsible for the good and evil in their lives.[9] Aristotle believed that an individual was morally responsible if, with knowledge of the circumstances and freedom from external compulsion, he deliberately chose to commit a specific act.[10]

In the sixth century, the Code of Justinian recognized the status of children and insane persons as not being responsible for their acts.[11] At that time, there also appeared the beginnings of a "heat of passion" test with the recognition that "punishment is mitigated" for one who commits homicide in a brawl.[12] By the time of Elizabeth I of England, the law had evolved to the point where insane persons and children were exempted from punishment for their acts because they could not comprehend the morality of what they had done.[13]

Thus, the concept evolved that, like children, insane persons had no free will and therefore could not avoid doing the criminal acts they did. The morality of society dictated that these insane persons not be punished because they could not control their behavior. However, although these individuals were not punished in the traditional sense by losing an arm for stealing or a life for killing, they were not set free but were restrained in some manner. This usually meant that they spent the rest of their lives institutionalized.

M'Naghten

These early laws relating to lack of criminal responsibility formed the foundations of our present insanity defenses which arose from the case of Daniel M'Naghten.[14] In 1843, Daniel M'Naghten, a Glasgow wood turner, suffered from the delusion that the British Prime Minister, Sir Robert Peel, the Pope, and the Jesuits were all conspiring against him. In order to protect himself, M'Naghten decided to kill Peel. Upon arrival at the Prime Minister's home, M'Naghten shot Edward Drummond, Peel's secretary, believing him to be the Prime Minister.

---

[7] *See* Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111 (1975) [hereinafter cited as Gerber]. This article provides a good review of the insanity defense.

[8] The Talmud provides: "It is an ill thing to knock against a deaf-mute, an imbecile, or a minor: He that wounds them is culpable, but if they wound others they are not culpable. . . . For with them only the act is of consequence while the intention is of no consequence." Quen, *Anglo-American Criminal Insanity—An Historical Perspective*, 10 J. HIST. BEHAV. SCI. 313 (1974).

[9] PLATO, THE REPUBLIC 350 (Conford trans. 1945).

[10] ARISTOTLE, THE NICOMACHEAN ETHICS 58 (Ross trans. 1975).

[11] DIGEST 48. 8. 2.

[12] *Id.*

[13] *See* Gerber, *supra* note 7, at 114.

M'Naghten's trial was the first to recognize the developing medical science of psychiatry. Nine medical witnesses testified that M'Naghten was totally insane. Dr. Isaac Ray's book on forensic psychiatry was widely quoted to the court.[15] The jury found M'Naghten insane[16] and he spent the remainder of his life in Broadmoor, a mental institution.

The case created such a furor that Parliament debated whether M'Naghten's acquittal would make it easier for criminals to be excused for their behavior.[17] The Parliament asked the common law judges to respond to five questions.[18] Their answers resulted in the adoption of the *M'Naghten* rule in Great Britain. The answer of Lord Chief Justice Tindal became the official statement of the rule:

> [T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[19]

---

[14] M'Naghten's Case, 8 Eng. Rep. 718 (1843).

[15] I. Ray, Medical Jurisprudence of Insanity (1838).

[16] 8 Eng. Rep. 718, 720 (1843).

[17] *Id.* at 720-24.

[18] The five questions were as follows: What is the law respecting alleged crimes committed by persons afflicted with insane delusion with respect to one or more particular subjects or persons; as for instance, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? 2. What are the proper questions to be submitted to the jury when a person, alleged to be inflicted with an insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, and insanity is set up as a defense? 3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed? 4. If the person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused? 5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion as to whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, and whether he was labouring under any and what delusion at that time? *Id.* at 720.

[19] *Id.* at 722.

Frequently, a criminal law professor, to demonstrate lack of mens rea sufficient to meet the *M'Naghten* test, will give the example of the man who thinks he is squeezing an orange, when he is actually strangling his wife. Obviously in this case the man does not know what he is doing, is mentally ill, and cannot know that "squeezing an orange" is wrong. The *M'Naghten* rule, also known as the right or wrong test, became part of the law of the United States. This rule has been widely accepted with little modification in many states for the past 137 years, and is used by twenty states.[20] Under *M'Naghten*, the accused is not responsible for his actions if at the time of the act he had a mental disease which prevented him from knowing the nature and quality of the act, or that it was wrong.[21]

Until 1954, the *M'Naghten* rule was the standard test used in the United States to determine whether someone was criminally responsible. As the middle of the twentieth century approached, however, psychiatry became more widely accepted as a medical science possessing the ability to add knowledge to the determination of whether someone should be held criminally responsible. Criticism of *M'Naghten* grew because the rule did not consider modern advances in psychiatry, and critics argued that too few people were excused from criminal responsibility.[22]

Durham

In 1954, the United States Court of Appeals for the District of Columbia reversed the conviction of Monte Durham for housebreaking and petit larceny.[23] Writing for the majority, Judge David Bazelon held that Durham had presented enough evidence to raise the issue of his insanity under the standard then used in the District of Columbia.[24] The court used the occasion to reject the *M'Naghten* rule as too narrow and espoused a broader test which became known as the *Durham* rule or the New Hampshire rule.[25] The rule provided that: "[A]n accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect."[26]

---

[20] *See* Appendix A which lists the states that have adopted *M'Naghten*.

[21] ARIZ. REV. STAT. § 13-502 (Supp. 1980) provides:

> A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.

[22] *See, e.g.*, F. ALEXANDER, THE CRIMINAL, THE JUDGE, AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS 70 (1931); B. CARDERO, WHAT MEDICINE CAN DO FOR THE LAW 28 (1930); K. MENNINGER, THE HUMAN MIND 450 (3d ed. 1945).

[23] Durham v. United States, 214 F.2d 862, 864 (D.C. Cir. 1954).

[24] *Id.* at 866. The District of Columbia used *M'Naghten* with an irresistible impulse test. *See id.* at 869.

[25] New Hampshire's test was described in New Hampshire v. Pike, 49 N.H. 399 (1869).

The *Durham* rule created much controversy, and resulted in many discussions in the legal literature about its potential impact.[27] The rule was adopted only by Maine,[28] New Hampshire,[29] and the United States District Court for the District of Columbia.[30] The purpose of the rule was to permit psychiatric testimony on a broad range of issues, with the definition of mental disease or defect purposely left vague. The implementation of the *Durham* rule in the District of Columbia resulted in a dramatic increase in the number of persons who were excused from criminal responsibility because of an insanity defense.[31] In the four years before the *Durham* rule was implemented, there were thirty-four people acquitted based on insanity.[32] In the four years after the rule, there were 150 acquittals.[33] By 1972, Judge Bazelon repudiated *Durham* in a case which accepted the American Law Institute standard[34] as the appropriate one for the District of Columbia.[35]

The major impact of *Durham* was to spur discussion of what type of test would be appropriate to avoid the problems of *M'Naghten*, which was too narrow, and *Durham*, which was too broad.[36] *Durham* was repudiated in *United States v. Brawner*[37] because the D.C. Circuit felt that the psychiatric experts had been usurping the jury function by testifying about conclusions which should be drawn from the facts.[38]

New Hampshire adopted this test in 1869, yet was given very little credit for being innovative. It was not until Judge Bazelon wrote the *Durham* decision that discussion began on the innovativeness of concepts which New Hampshire had accepted for eighty-five years.

26. Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

27. *See, e.g.*, Goldstein *supra* note 2; Wechsler, *The Criteria of Criminal Responsibility*, 22 U. Chi. L. Rev. 367 (1955); Note, *Century of Progress: The Durham Case*, Int'l J. For. Sci. 41 (1956); Note, *The Durham Rule*, 40 Iowa L. Rev. 652 (1955); Note, *Criminal Law: A Significant Development in the Law Relating to Insanity as a Defense to Crime*, 1955 Wis. L. Rev. 506.

28. Me. Rev. Stat. tit. 15, § 102 (repealed 1976); *see id.* tit. 17-A, § 58 (1979) (new statute applies *Brawner* test).

29. New Hampshire did not codified its law, but stated it in New Hampshire v. Pike, 49 N.H. 399 (1869).

30. The District of Columbia's rule was stated in Durham v. United States, 214 F.2d 862, 869 (D.C. Cir. 1954).

31. President's Commission on Crime in the District of Columbia Report 535 (1966).

32. *Id.*

33. *Id.*

34. Model Penal Code § 4.01(1) (1962). *See* text accompanying note 45 *infra*.

35. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

36. *See, e.g.*, Hall, *Mental Disease and Criminal Responsibility — M'Naghten Versus Durham and the American Law Institute's Tentative Draft*, 33 Ind. L.J. 212 (1958) [hereinafter cited as *M'Naghten Versus Durham*].

37. 471 F.2d 969, 1000 (D.C. Cir. 1972).

38. *Id.* at 1006.

Irresistible Impulse

When *Durham* was adopted by the District of Columbia, the majority of states were still using *M'Naghten*.[39] Some states added to *M'Naghten* the concept of an irresistible impulse.[40] Although there does not appear to be a uniform standard for irresistible impulse, the concept is that the defendant was unable to control himself. The irresistible impulse test was stated by the United States Court of Appeals for the District of Columbia in *Smith v. United States*:[41]

> The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases, where the defense of insanity is interposed. The accepted rule in this day and age, with the great advancement in medical science as an enlightening influence on this subject, is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong.[42]

A number of states still use *M'Naghten* plus some form of an irresistible impulse test.

The ALI Test

Beginning in the early 1960's, the American Law Institute[43] began to develop a test to end the strictness of *M'Naghten* and avoid the broadness of *Durham*. The ALI felt that *Durham* made it possible for a defendant to use any mental disease as an excuse for avoiding criminal responsibility.[44] The ALI test stated that:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

---

[39] GOLDSTEIN *supra* note 2.

[40] *See* Appendix A.

[41] 36 F.2d 548 (D.C. Cir. 1929).

[42] *Id.* at 549.

[43] Hereinafter referred to as ALI.

[44] *See, e.g.*, United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); *M'Naghten Versus Durham supra* note 36.

> As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.[45]

The ALI test is now used by twenty-eight states.[46]

The ALI test is not without its critics. Some commentators feel that too many people are excused from responsibility under this test.[47] This has resulted in calls for the abolition of the insanity defense,[48] and for psychiatrists to get out of the courtroom.[49] Predictably, the controversy about the insanity defense arises each time it is successfully used in a bizarre murder case.

Diminished Capacity

Although *M'Naghten* was widely accepted, many states felt that in certain circumstances the test was too harsh. In 1949, the concept of diminished responsibility arose in California.[50] The California Supreme Court reasoned that when a specific mental state is required it cannot be presumed but must be proven.[51] This concept can be used to reduce the gravity of a charge in a criminal case.[52] For example, in a first degree murder case, where there was testimony that the defendant could not form the specific intent necessary, or could form the specific intent to some degree, but because of a mental illness he was thinking deficiently, this evidence might be sufficient to reduce the charge to second degree murder or manslaughter.[53] Some form of this concept has been used by approximately fifteen states.[54] Under this approach, diminished capacity does not serve to excuse criminal responsibility but to mitigate the punishment by reducing the offense with which the defendant is charged, thereby reducing the possible prison sentence.

Before closing this discussion of the background of the insanity defense, some additional items must be mentioned to give the reader a complete understanding of the present situation in the United States. Today, throughout the United States, most of the states use either the *M'Naghten* rule,[55] the ALI rule,[56] or some modification of *M'Naghten* such as *M'Naghten* plus an irresistible impulse test.[57] In most states, the insanity defense is only raised when the defendant is charged with murder or attempted murder. It is seldom raised in cases of armed robbery, burglary, or rape. Although most felonies have an intent element, it is usually in the murder situation that it seems most plausible to raise an insanity defense. This defense is most likely to be raised in the case of killing a family member, or a murder which occurred in a bizarre way, such as dismembering the victim.

---

[45] MODEL PENAL CODE § 4.01 (1962).

[46] *See* Appendix A.

[47] *See* note 3 *supra*.

[48] *See, e.g.*, Goldstein & Katz, *supra* note 1, which was the first of many articles in both the legal and psychiatric literature to discuss abolition.

[49] K. MENNINGER, THE CRIME OF PUNISHMENT (1968); T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963); Halpern, *The Insanity Defense: A Juridical Anachronism*, 7:8 PSYCH. ANNALS 41 (1977).

[50] California v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949).

[51] *Id.* at 350, 202 P.2d at 65.

[52] *Id.* at 347, 202 P.2d at 63.

[53] H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 117-33 (1979). This book provides an excellent discussion of the concept of diminished responsibility.

[54] *Id.* at 117 n.1.

By pleading insanity, the defendant is admitting that he has committed the act which constitutes the crime, but he is stating that because of his mental state he could not form the mental intent necessary for there to be any legal culpability. A good defense attorney will not consider an insanity defense if he believes that the state does not have sufficient evidence to convict his client. This is because an insanity defense will usually result in some type of institutionalization, whereas an outright acquittal makes it possible for the defendant to be freed immediately.

WHAT HAPPENS TO THE PERSON WHO SUCCESSFULLY PLEADS NOT GUILTY BY REASON OF INSANITY?

Past Practices

Like Daniel M'Naghten, defendants who successfully pleaded the insanity defense knew that they would spend their lives not in a prison, but in a mental hospital or a hospital for the criminally insane. Because these individuals would be locked away from the public, prosecutors were often not as vigorous as they could have been in fighting an insanity defense. The public felt protected when, after daily headlines from these often bizarre murder cases, the defendant would be found not guilty by reason of insanity and sent to the state hospital for the criminally insane. There the individual would usually remain until he died. The public could feel that society was just because it did not punish this "sick" killer, but afforded him treatment.

Until the mid-1950's, an individual who was mentally ill would be sent to a state mental hospital, usually far removed from a population center, and would remain there for many years, if not the rest of his life.[58] With the advent of psychotropic medication in the 1950's, however, the entire concept of how to treat the mentally ill changed radically. Drugs made it possible for patients with chronic illnesses to control their symptoms.[59] Manic depressive illness could be controlled by the use of lithium carbonate;[60] hallucinations and paranoid behavior which afflicted the schizophrenic also could be alleviated with drugs.[61]

---

[55] *See* Appendix A.
[56] *Id.*
[57] *Id.*

The psychotropic drugs forced the public to readjust its thinking about mental patients. These drugs made it possible for the individual to enter the hospital, become stabilized, and then return to his community. This in turn led to the emptying of state institutions, greatly reducing the average length of stay in the hospital. For example, in Illinois in 1955, there were approximately 48,000 beds in the Illinois Department of Mental Health for mental patients.[62] These patients would spend an average of ten years and eight months in the hospital.[63] Today, there are about 10,000 inpatient beds, half of which are for the severely or profoundly retarded.[64] The average length of stay for a mentally ill person in a state hospital is now twenty-two days.[65]

Added to the success of psychotropic drugs, which started the move toward deinstitutionalization, came the class action suits of the late 1960's and early 1970's challenging the procedures whereby an individual was committed.[66] In addition, the courts recognized the fact that the patient should be treated in the least restrictive setting necessary to meet his needs.[67] The concept of treatment in the least restrictive environment has spread from the case law to recently enacted mental health codes.[68] It became accepted policy that mentally ill people would be kept in the hospital for only the time that would be necessary to stabilize them.

---

[58] E. Goffman, Asylums: Essays on the Social Situations of Mental Patients and Other Inmates (1961) is the classic book on the plight of the mental patient in large state institutions. *See also* Bassuk & Gerson, *Deinstitutionalization and Mental Health Services*, 238 Sci. Am. No. 2 at 46-53 (1978); Etzioni, *No Place to Go*, The Washington Monthly, Dec. 1976, at 42; Raphling & Lion, *Patients with Repeated Admissions to a Psychiatric Emergency Service*, 6 Comm. Mental Health J. 313-18 (1970); Slovenko & Luby, *From Moral Treatment to Railroading Out of the Mental Hospital*, 2 Bull. Am. Acad. Psych. Law 223-36 (1974).

[59] D. Goodwin & S. Guze, Psychiatric Diagnosis (2d ed. 1979); Anderson & Kuehnle, *Strategies for the Treatment of Acute Psychosis*, 229 JAMA 1884 (1974).

[60] *The Lithium Ion Impact on Treatment and Research*, 36 Arch. Gen. Psych. No. 8 at 829 (F. Goodwin ed. 1979).

[61] L. Grinspoon, Schizophrenia: Pharmacotherapy and Psychotherapy (1972).

[62] Illinois Department of Mental Health, Research and Statistical Branch (on file with author).

[63] *Id.*

[64] Annual Report of the Illinois Department of Mental Health and Developmental Disabilities (1979).

[65] *Id.*

[66] Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated*, 431 U.S. 119 (1977); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Bell v. Wayne County Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974).

The success of these lawsuits in opening the doors of mental institutions raised questions about what was happening to the person found not guilty by reason of insanity and those found unfit to stand trial.[69] Public defenders and legal aid attorneys began to question the policies relating to the mentally ill offender. In *Jackson v. Indiana*,[70] the practice of automatically committing a person found unfit to stand trial to a state mental institution was challenged. The United States Supreme Court, in *Jackson*, held that the same standard of commitment had to be used for the person found unfit to stand trial as was used for other civilly committed individuals.[71] In *Baxstrom v. Herold*,[72] the Supreme Court reviewed the release procedures for persons who had been committed to hospitals for the criminally insane.[73]

Present Reality

Today, in most states, once a defendant has been successful with his insanity defense plea, the options available to the criminal court judge are very limited. In a few states, commitment to a mental health facility for some period of time is automatic.[74] In most states, the court must hold a hearing or request the prosecutor to petition for a hearing using the same standard of civil commitment as is used in the mental health code.[75] Since most states require that the person who is subject to hospitalization be mentally ill and, because of that illness, be likely to be dangerous to himself or others in the near future, the court is often faced with a situation where the defendant's symptoms are sufficiently in remission so that he does not qualify for involuntary admission under the civil commitment standard. This means that the judge has no choice but to discharge the defendant. Only a few states give the judge the alternative of discharging the defendant under conditions the court deems appropriate.[76] Even fewer states have developed outpatient programs to help this sub-population of mentally ill people.[77] The present state of affairs is fraught with problems from both the courts' and the public's perspective.

---

[67] Lake v. Cameron, 364 F.2d 657 (D.C. Cir.), *cert. denied*, 382 U.S. 863 (1966); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971).

[68] *See, e.g.*, ILL. REV. STAT. ch. 91½, § 3-811 (Supp. 1978); N.Y. MENTAL HYG. LAW § 1.00 (McKinney 1978); WASH. REV. CODE ANN. § 71.05.230 (Supp. 1978).

[69] Jackson v. Indiana, 406 U.S. 715 (1972); United States v. Ecker, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

[70] 406 U.S. 715 (1972).

[71] *Id.* at 730.

[72] 383 U.S. 107 (1966).

[73] *Id.* at 111-13.

[74] *See* Appendix B.

[75] *See id.*

PROBLEMS WITH THE PRESENT SYSTEM

In almost every state, the present system relating to the disposition of the individual found not guilty by reason of insanity is filled with barriers which make it difficult, if not impossible, for the criminal court judge to assure that the public's safety is being protected. This system has four major problems: (1) the NGRI individual must meet the civil commitment standard; (2) the court is limited to either civil commitment or discharge; (3) in most states there is no option for court imposed outpatient treatment; and (4) there are no provisions for review of the discharge decision in the majority of states.

Problems Surrounding Commitment

Once a defendant is found not guilty by reason of insanity, the criminal court is faced with the issue of how to get the individual committed into the mental health system. In some states, after a finding of NGRI, commitment is automatic.[78] In those states, the automatic commitment is usually for a brief period of time so that the mental health system can assess whether the defendant meets the civil commitment standard and warrants continued inpatient hospitalization. In the majority of states, the court must proceed with a hearing to determine whether the individual meets the civil commitment standard. In many states, this is accomplished by the prosecutor petitioning for commitment under the civil commitment statute.[79]

The standard for civil commitment raises the first barrier to assuring the safety of the public. In most states, the standard for civil commitment is based upon the state's police power to remove dangerous people from the streets for the community's protection. This power has led to statutes which require that, before someone can be involuntarily confined in a mental hospital, the state must prove that the individual is likely to be dangerous to himself or others in the near future.[80] To meet this burden in the average civil commitment case, the state must show that the individual is suicidal or homicidal at the present time.

---

[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] *See id.*

Since most persons who have been found NGRI were excused from criminal responsibility because they were psychotic at the time, one would think it would be easy to commit them. However, by the time of the trial, the NGRI individual's psychosis has ended. He has probably received some form of psychiatric treatment which caused his symptoms to disappear sufficiently so that he could be found fit to stand trial. Even if the NGRI individual is not on medication, the cyclical nature of his illness would have caused his psychosis to disappear. Thus, from the outset, by using the civil commitment standard, it is very difficult to get the NGRI individual into involuntary treatment.

In addition to the standard which must be met in most states, the burden becomes particularly difficult because eleven states require that the dangerousness be manifested by a recent, overt act.[81] This is usually defined to include threats that occurred within a specific time period. If the NGRI individual has been institutionalized, it is unlikely that he would have "acted out" because of his being situated in a jail. At the hearing on civil commitment, it is very likely that the rules of evidence will bar a description of the criminal conduct because it is too far removed from the commitment hearing. The state thus may have a very difficult time convincing the court that this individual is in need of civil commitment. Moreover, in about thirteen states, the situation is further complicated by requirements that, before an individual can be civilly committed, the state must prove beyond a reasonable doubt that he meets the civil commitment standard.[82] When the criminal evidentiary standard of proof is applied to civil commitment cases, it becomes even more difficult for the state to succeed in getting the NGRI individual into involuntary treatment.

---

[80] *E.g.*, ILL. REV. STAT. ch. 91½, § 1-119 (Supp. 1978) provides: "Person subject to involuntary admission . . . means: (1) A person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future. . . ."

[81] ALA. CODE tit. 22, § 52-1 (Supp. 1979); CAL. WELF. & INST. CODE § 5150 (West Supp. 1980); MASS. GEN. LAWS ANN. ch. 123, § 1 (West Supp. 1979); MINN. STAT. ANN. § 253A.02 (West Supp. 1980); NEB. REV. STAT. § 83-1009 (1976); N.D. CENT. CODE § 25-01-01 (Supp. 1979); OHIO REV. CODE ANN. § 5122.01 (Page Supp. 1980); 50 PA. CONS. STAT. ANN. § 7301 (Purdon Supp. 1979); VT. STAT. ANN. tit. 18, § 7101 (Supp. 1979); WASH. REV. CODE § 71.05.020 (Supp. 1979).

[82] *In re* Hodges, 325 A.2d 605 (D.C. Ct. Appeals 1974); Superintendent of Worcester State Hosp. v. Hagberg, 372 N.E.2d 242 (Mass. 1978); Lausche v. Commissioner of Public Welfare, 302 Minn. 65, 225 N.W.2d 366 (1974), *cert. denied*, 420 U.S. 993 (1975); Proctor v. Butler, 117 N.H. 927, 380 A.2d 673 (1977); HAWAII REV. STAT. § 334-60(4)(I) (Supp. 1979); IDAHO CODE § 66-329(i) (Supp. 1979): KAN. STAT. § 59-2917 (Supp. 1979); MONT. REV. CODES ANN. § 38-1305(7) (Supp. 1977); OKLA. STAT. tit. 43A; § 54.1(C) (Supp. 1980); OR. REV. STAT. § 426-130 (1979); UTAH CODE ANN. § 64-7-36(10) (Supp. 1979); WIS. STAT. § 51.20(13)(e) (Supp. 1979-80). *See also* Denton v. Kentucky, 383 S.W.2d 681 (Ky. 1964); *In re* J.W., 44 N.J. Super. 216, 130 A.2d 64, *cert. denied*, 24 N.J. 465, 132 A.2d 558 (1957).

Recently, in *Addington v. Texas*,[83] the United States Supreme Court recognized the need to balance the deprivation of liberty imposed by an involuntary hospitalization for mental illness against the state's interest in protecting the public from danger. The Court stated: "We have concluded that the reasonable doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment."[84] Although the Supreme Court decision in *Addington* recognizes some of the problems the state faces in the area of civil commitment, for those states which use the beyond a reasonable doubt standard, it is very difficult to meet this burden of proof in the case of the NGRI individual.

Finally, when one reviews the problems surrounding the commitment of the NGRI individual, one cannot help but notice the absurd situation of the prosecutor. At the trial on the criminal charge, the prosecutor must argue that the defendant knew what he was doing and was not insane. Once the defendant is found not guilty by reason of insanity, the prosecutor must reverse his position and argue that the defendant is now insane enough to require involuntary hospitalization. When added to the fact that in many states the civil commitment hearing is held before a different judge who is probably not aware of the criminal charge or the specifics of the crime, one can understand why the present situation must be changed.

Options When Civil Commitment is Unsuccessful

If the NGRI individual cannot be civilly committed, the court in most states has no other option but to discharge the individual from custody.[85] This means that the individual who has manifested his mental illness by committing a criminal act is now free to return to the streets with no one to monitor whether his illness continues in remission. Since many mentally ill people can have their symptoms controlled by the proper medication, it is essential that they receive this medication.[86] Not only must the medication be taken, but someone must be monitoring the person to be sure he is on the right dosage and has his illness under control.[87] One of the problems encountered by treatment professionals is that the chronically mentally ill person often refuses to take his medication when he feels he is doing well; then he deteriorates and returns to the hospital again. Once in the hospital, he is stabilized and the revolving door syndrome begins.[88] Because the court has no control over these individuals, and because many of them cannot be relied upon to take their medication or seek treatment as they deteriorate, the public's safety is placed in jeopardy.

---

[83] 441 U.S. 418 (1979).

[84] *Id.* at 432.

[85] If not automatically committed, the individual could be discharged in Alabama, Arkansas, California, Florida, Hawaii, Iowa, Kentucky, Maryland, Illinois, Indiana, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Wisconsin, and Wyoming.

There are a number of states that give the court the option of discharging the individual from custody under such conditions as the court deems best.[89] In most states which permit the option of a court supervised discharge, it is unclear whether there are any programs designed for the NGRI individual or whether anyone is actually monitoring the person to be sure he is following the court order. Additionally, it is unclear what options are available to the court if the individual ignores the court order.

Proceedings Upon Discharge from the Hospital

The final area of concern raised by the present system is that, in many states, once the individual has been committed to the state mental health facility, he is no longer under the jurisdiction of the criminal court.[90] Once the individual is committed to a mental health facility, the staff will often know little more than that he was found not guilty by reason of insanity. The criminal record will not follow the NGRI individual to the hospital. The treatment staff may not be aware of the crime the patient was charged with or the specifics of what occurred during the crime. The author is personally aware of cases where the treatment staff did not believe that the individual could have been a murderer, and was ready to discharge the patient within one week of his entering the hospital.[91] The staff, unaware of the specifics of the past criminal conduct, will treat the NGRI individual the same as the other patients. By ignoring the violent behavior which led to the criminal charges, the staff has an incomplete picture of the patient's personality.

---

[86] L. HOLLISTER, CLINICAL USE OF PSYCHOTHERAPEUTIC DRUGS (1973).

[87] Davis, *Overview: Maintenance Therapy in Psychiatry: II. Affective Disorders*, 133 AM. J. PSYCH. 1-13 (1976).

[88] S. GALANN, HANDBOOK OF COMMUNITY MENTAL HEALTH (1972).

[89] *See* Appendix B.

[90] *See id.*

[91] The author was formally an attorney for the Illinois Department of Mental Health. In that capacity, she was consulted about releasing someone who had been found NGRI of murder the week before. The therapist stated "I know Mr. ——— didn't commit any violent act, he is ready to be discharged." When the therapist was asked if he knew Mr. ——— had been found not

With the advent of psychotropic medications,[92] the average length of stay in the hospital has decreased radically. Once the individual is stabilized, the staff begins to think of discharging him. With the economics of hospitalization, the emphasis is on returning the person to the community as soon as possible. Therefore, in its haste to save money, the staff will begin planning for discharge at the moment of admission.[93] This will probably result in the NGRI individual being returned to the community within a very short period of time after he has been found not guilty.

Twenty-nine states require that, before discharging a NGRI individual, the criminal court review the discharge.[94] By having the court review the discharge, the public can be assured that someone who is familiar with the criminal case and is not concerned with the economics of hospitalization will be reviewing whether discharge is appropriate, both from the perspective of the patient's treatment needs and the danger he may present to the community. The criminal court judge is acting to safeguard the interests of the community.

The present system leaves many people in the criminal justice system frustrated and concerned that the public is not being properly protected. This situation arises because the NGRI individual is treated the same as other civilly committed persons. Some would agree that this is appropriate because they have been found not guilty. However, this author believes that these people can be treated differently, based upon their past behavior, and that the law sanctions such differences in treatment.[95]

In those states where there are problems with the present procedures when someone is found not guilty by reason of insanity, the author would like to suggest amending the present law to include some or all of the elements necessary to remedy these problems. These provisions are found in the "model legislation" presented below.

guilty of murder his rely was "Mr. ——— said it was a mistake and he didn't commit any violent act."

[92] Brill, *The Impact of Modern Chemotherapy on Hospital Organization: Its Scope and Its Limits*, in PROCEEDINGS OF THE THIRD WORLD CONGRESS OF PSYCHIATRY (Vol. 3 1964).

[93] *See* note 88 *supra*.

[94] *See* Appendix B.

[95] Due process and equal protection issues are discussed in the text accompanying notes 99-119 *infra*.

MODEL LEGISLATION FOR PROCEEDINGS AFTER BEING FOUND NOT GUILTY BY REASON OF INSANITY

Section 1: Definitions

a. Acquittee—person found not guilty by reason of insanity.
b. "In need of mental health services"—an acquittee who is mentally ill and needs either inpatient or outpatient mental health services.
c. "Mentally ill"—includes any acquittee who has a mental disease or defect. This would include individuals whose illness is in a state of remission if there is a reasonable medical probability that the illness could become active again, and when active would render the individual dangerous to himself or others.
d. "Person subject to involuntary hospitalization"—an acquittee who, because of a mental illness, is reasonably expected to be a danger to himself or others.
e. "Person subject to conditional release"—an acquittee who no longer is subject to involuntary hospitalization but would benefit from mental health services.
f. "Mental health services"—includes but is not limited to: outpatient services including drug and alcohol rehabilitation programs; community adjustment programs; individual, group, or family therapy; or chemotherapy.

Section 2: Court Ordered Evaluation

Immediately upon a finding of not guilty by reason of insanity, the court shall order the acquittee to the Department of Mental Health for a period of thirty days for an evaluation as to his need for mental health services. The Department shall provide the court within forty-five days of the acquittee's arrival a report stating whether the acquittee is in need of mental health services and detailing any services which the Department recommends.

The court may also order the acquittee to be evaluated by an independent expert upon the acquittee's motion, the motion of the state, or upon the court's own order. This report shall also determine whether the defendant is in need of mental health services, and make recommendations as to the specific services.

Section 3: Hearing as to Need for Mental Health Services

a. Within sixty days from the finding of not guilty by reason of insanity, the court shall hold a hearing to determine if the acquittee is in need of mental health services. The court shall consider whatever reports and testimony it has received from mental health professionals, as well as the information presented at the criminal trial which related to the defendant's insanity, as evidenced by the crime he was charged with.
b. The findings of the court shall be established by clear and convincing evidence. The burden of proof and the burden of going

forth with the evidence shall rest with the State. The acquittee shall be represented by counsel.

c. The court may find:
1. The acquittee is not in need of mental health services, and he shall be discharged immediately from the custody of the court.
2. The acquittee is subject to involuntary hospitalization, and he shall be admitted to the custody of the Department of Mental Health to be treated as provided for in the Mental Health Code except as provided hereinafter. This treatment shall include periodic review of his need for continued hospitalization.
3. The acquittee is in need of mental health services. The court then shall determine how the defendant should receive these services. The court can order a conditional release of the defendant, if inpatient care is not required, under such conditions as will assure the acquittee's progress in treatment and the safety of the community. If the acquittee is conditionally released from the custody of the Department or the court, the court can order that the facility accepting the acquittee for outpatient treatment provide periodic reports to the court as to the acquittee's progress.

Section 4: Conditional Release

a. When the court orders the acquittee released conditionally, upon conditions stated in the court order, the court shall determine how long the acquittee shall remain under the jurisdiction of the court. A conditional release shall not be for a period of more than five years from the time the conditional release is ordered.

b. If the acquittee violates the conditions of his release, he shall be immediately hospitalized for an evaluation as to his need for mental health services. Within twenty days of his being rehospitalized, the court shall hold a hearing to make the same findings it can make under section 3.c. If the court finds that the acquittee is not in need of any mental health services, or can satisfactorily receive mental health services on an outpatient basis, it shall so rule. The court shall have the option of holding the acquittee in contempt of court for violating its initial court order.

Section 5: Procedures for Person in Custody of Department of Mental Health

a. Any person in the custody of the Department of Mental Health pursuant to the provisions of this Act, shall be treated according to the Mental Health Code except that before he can be given overnight passes or other off-grounds passes which shall be for more than ten hours, the court shall be notified, and shall have an opportunity to object to such off-grounds passes on the basis that the public's safety will not be protected.

b. Should any person in the custody of the Department of Mental Health escape from custody, the police and the court shall be notified, and all procedures necessary to implement the acquittee's return to custody shall be followed.

Section 6: Procedures for Discharge from the Custody of the Department of Mental Health

a. When the director of the hospital which is providing treatment to the acquittee determines that he is no longer in need of inpatient hospitalization, the director shall notify the court with a statement, including acquittee's mental status, and suggestions for outpatient care or whatever follow-up care the director deems in the best interest of the acquittee to protect him and to protect the public.

b. Within thirty days of the notification, the court shall hold a hearing to determine whether the acquittee is ready to be discharged from the custody of the Department of Mental Health and under what conditions, if any.

c. At the hearing, the acquittee shall be represented by an attorney. The State shall have the burden of proving by clear and convincing evidence that the acquittee is in need of continued hospitalization, if it disagrees with the recommendations of the director of the hospital.

d. The court can dispense with a hearing if all parties agree to adopt the recommendations of the director of the hospital and the acquittee is accepted into an outpatient program that is willing to periodically report to the court on the acquittee's progress.

e. The court shall make findings in accordance with section 3.c. and if the acquittee is conditionally released it shall be in accordance with section 4.

Section 7: Petition by Acquittee for Discharge from Custody or Custodial Release

a. At any time after sixty days of being placed in the custody of the Department of Mental Health or on conditional release, the acquittee may petition the court for discharge from custody or a modification of the terms of conditional release or a discharge from conditional release. The acquittee shall have the burden of proving by clear and convincing evidence why the release sought in his petition should be granted. The court may then appoint independent experts to evaluate the acquittee to determine if his petition should be granted. Within sixty days from receiving the petition, the court shall hold a hearing to consider the petition. The court shall then make its findings.

b. If the relief sought in the petition is denied, the acquittee shall not be permitted to file another petition for at least six months from the date of the court hearing.

Section 8: Remedy of Habeas Corpus

Any order under this Act shall not affect the remedy of habeas corpus.

Section 9: Applicability to Persons Presently in the System

This act sets forth procedures which apply to all persons found not guilty by reason of insanity. Before any person previously found not guilty by reason of insanity can be discharged from the Department of Mental Health, the provisions of this article must be complied with.

The above model legislation meets the problems encountered in the present system. Below is a brief review of how these problems are solved:

a. Proceedings Continue in the Criminal Court: By continuing jurisdiction in the criminal court, rather than removing the commitment hearing to a civil court, the model legislation provides that the judge who is most familiar with the acquittee's criminal behavior and most aware of his illness will determine what is in the interest of the public and the acquittee. By keeping the proceedings in the criminal court and under the criminal code, you have distinguished the NGRI individual from other persons in need of mental health services. As explained in the next section of this article, this is legally permissible.

b. Broader Standard for Commitment: The definition of need of involuntary hospitalization is broader than the commitment standard in most civil statutes because it does not require that the manifestation of dangerousness be *likely to occur in the near future*. Additionally, the state does not have to be concerned with proving a recent overt act or meeting the beyond a reasonable doubt standard of proof.

c. Provisions for Outpatient Care Under Supervision: The conditional release provisions and the definition of in need of mental health services make it possible for the criminal court judge to assure that the acquittee is receiving the care he needs to keep his illness in remission and to protect the public. The provisions requiring periodic reports to the court and enforcement of the acquittee's conditional release terms assure a higher standard of compliance. This puts teeth into the conditional release provisions since there are known repercussions to the acquittee who does not follow those provisions.

d. Review of Discharge Decision: Under the model statute, the protection of the public is assured by provision for review of the recommendations for discharge of the director of the mental health hospital. Not only is the time of discharge reviewed, but the court can require outpatient provisions which will help assure the acquittee's satisfactory progress once outside of the hospital setting.

e. Permit Mental Health Department to Treat with Broad Discretion: Although there was no discussion in the previous section about the need for mental health professionals to be able to treat the patient without the court looking over their every move, the model legislation makes it clear that the department of mental health has discretion to treat the acquittee as it deems appropriate with the exception of giving the acquittee overnight off-grounds passes and discharging without the court's approval. With these two exceptions, the department of mental health is free to treat the patient in the way it deems best. This is an implicit recognition that the professionals in the mental health area should be free to perform their jobs without interference from the court, except when the public's safety must be protected.

A WORKING MODEL

A review of the statutes reveals that both Oregon[96] and Maryland[97] have workable laws that meet the goals of remedying the problems with the present system. The author had the opportunity to review the Maryland system and believes it provides an excellent example of how a state can meet the needs of the defendant while at the same time protecting the public's interest. Below is an operational overview of the Maryland system.

After a hearing has been held to determine that the defendant is in need of inpatient hospitalization, the defendant is sent to the Clifton T. Perkins Hospital in Baltimore, Maryland where he gradually is given more and more freedom, as it becomes apparent to the staff that he can handle this freedom. The hospital has vocational, educational, and recreational programs for its patients. Once the patient appears to be doing well, he is given a job within the hospital which requires that he work regular hours. If the patient handles these responsibilities well, the process of trying to find employment for the patient outside the hospital begins.

Perkins Hospital is located one-half hour from downtown Baltimore, making it possible to find employment opportunities. For a period of about three months, the patient will leave the hospital in the morning to work and return in the evening. Once the staff determines that the patient is able to handle these responsibilities, it begins planning for the discharge of the patient.

---

[96] OR. REV. STAT. §§ 161.319-161.351 (1979).

[97] MD. ANN. CODE art. 59, § 28 (1979).

As the discharge process begins, the staff involves the patient's family and begins looking for a suitable living situation for the patient. The staff knows success in the community is likely to depend upon being employed and living in a stable situation. Perkins Hospital also runs its own halfway house, located in Baltimore. This assures that the patient has somewhere to go where he will receive supervision and support. Once the staff is ready to discharge the patient, it petitions the court for a conditional discharge.

The court then specifies the conditions of discharge. Under Maryland law, the conditional discharge can remain in effect for up to five years. At any point during the hospitalization or during the conditional discharge, the patient can petition the court for discharge or modification of the conditions.

Usually, the person continues under the supervision of the staff of Perkins Hospital after receiving a conditional discharge. He may be living in the halfway house. Even if he is not residing at the halfway house, the patient is still meeting on a regular basis with a therapist from Perkins. As the patient needs less supervision, he may meet with the therapist less frequently. It is possible that in the beginning the patient will be meeting with his therapist a few times a week, and by the end of five years may only be meeting with the therapist every month or every few months.

This system has the advantage of exposing the patient to more responsibilities and more freedom on a gradual basis. While the patient is being exposed to these responsibilities, a qualified staff is monitoring, evaluating, and supporting the patient. Before the patient is exposed to more freedom, the staff has determined what his needs are and has tried to meet them through educational or vocational programs. Only when a conditional discharge is requested does the court review the suggestions of the Maryland Department of Mental Health. Until that time, the department is free to proceed in the manner it feels is most appropriate.

The Maryland program appears to be working very successfully.[98]

---

[98] Clifton T. Perkins Outcome Study: A Review of 65 Patients Presently on Convalescent Leave (D. Madden, Consultant) (unpublished study on file with author).

The program contains most of the elements in the proposed model legislation and shows that it is possible to meet the needs of the patient while protecting the interests of the public.

LEGAL JUSTIFICATION FOR TREATING NGRI INDIVIDUALS DIFFERENTLY THAN OTHER CIVILLY COMMITTED PERSONS

This article has been based upon the premise that once an individual has been found NGRI, the state may treat him differently than other persons who are facing civil commitment proceedings. The model legislation suggested herein treats the NGRI individual differently at the time of commitment by using a broader standard of commitment. It also treats him differently in terms of off-grounds passes, review of the decision to discharge, and by permitting the court to impose court supervised outpatient care for up to five years after inpatient discharge.

The fourteenth amendment of the United States Constitution provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."[99] There are those who will argue that, once an individual has been found not guilty by reason of insanity, he is no longer under the jurisdiction of the criminal courts and must be treated the same as other individuals where civil commitment is the goal. This author believes that the law which permits treating the NGRI individual differently from other civilly committed persons is well-established. The arguments against differentials in treatment follow two predictable paths: denial of due process and denial of equal protection.

Due Process

The due process clause of the fourteenth amendment is recognized as the provision which assures that an individual is afforded certain rights at the time the state is trying to deprive him of his liberty or property. The amount of process which is due depends upon the circumstances. When the state tries to deprive an individual of his property, he is entitled to fewer protective procedures than if he were being deprived of his liberty. A civil commitment for mental illness is a deprivation of liberty which entitles the patient to certain rights.[100] These rights include notice of the proceedings,[101] the right to cross examination,[102] and the right to be represented by an attorney.[103] In the proposed model legislation, the NGRI is given the same rights as the person who is being civilly committed. In addition, to assure the rights of this person, periodic review of his status and permission to petition for his discharge or modification of his conditions of release are provided. Thus, a due process argument would be unsuccessful.

---

[99] U.S. CONST. amend. XIV.

[100] Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*

Equal Protection

The equal protection argument presents the need for a more thoughtful legal analysis. It can be anticipated that the attorney for the NGRI individual will argue that his client is not being treated equally to other civilly committed patients in four ways: (1) he is committed under a broader standard; (2) he is treated differently when it comes to off-grounds passes; (3) the discharge of the NGRI individual is subject to court review, while that of other civilly committed persons is not; and (4) the NGRI individual can have a particular mode of outpatient care imposed upon him for up to five years, while the civilly committed individual cannot be required to participate in any outpatient program.

The attorney would then go on to cite two United States Supreme Court decisions to prove that his client must be treated equally and is being denied equal protection. The first case the attorney would cite would be *Baxstrom v. Herold*.[104] In *Baxstrom*, the Court struck down a New York statutory scheme which permitted convicted persons to be civilly committed at the end of their prison terms without being granted the same rights as others where civil commitment was sought. The Court stated: "We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York."[105]

Baxstrom has been cited in numerous cases challenging provisions relating to persons found NGRI .[106] However, *Baxstrom* is different

on other grounds, 414 U.S. 473 (1974); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971).

[101] Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

[102] 349 F. Supp. at 1097-1100.

[103] *Id.* at 1097-98; Bartley v. Kremens, 402 F. Supp. 1039, 1050-51 (E.D. Pa. 1975).

[104] 383 U.S. 107 (1966).

[105] *Id.* at 110.

[106] *E.g.*, Powell v. Florida, 579 F.2d 324, 330-32 (5th Cir. 1978); Hill v. State, 358 So. 2d 190, 200 (Fla. App. 1978); Chase v. Kearns, 278 A.2d 132, 138 (Me. 1971).

from the situation the author anticipates because all NGRI individuals will be treated the same, whereas in *Baxstrom* the statute only applied to persons who were completing their prison terms and did not apply to convicted felons who had finished their sentences or were out on bail. The *Baxstrom* Court also relied upon the fact that these individuals were denied a jury and were committed in a procedure which clearly denied them their due process rights. In the model legislation, the NGRI individual is given the same procedural protection as the civilly committed person.

The second case the attorney for the NGRI individual would cite would be *Jackson v. Indiana*.[107] In *Jackson*, a retarded deaf mute was found unfit to stand trial and because of his unfitness was committed to the Indiana Department of Mental Health "until such time as that Department should certify to the court that 'the defendant is sane.' "[108] Because of his retardation and his inability to communicate, it was clear that Jackson would never become fit to stand trial. Yet, under the Indiana statute, Jackson was effectively committed for life. The Court concluded:

> [W]e hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by § 22-1209 or § 22-1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment.[109]

Jackson is different from the NGRI individual in a number of respects. First, Jackson had never been through the criminal justice system; there had been no determination of whether he had committed a crime. Second, there was no requirement that the state show that Jackson was dangerous before being committed. Dangerousness is recognized as the criterion for utilizing the state's police power to civilly commit.[110] Third, there were no provisions for periodic review of Jackson or for possible discharge until he recovered from his insanity. In the proposed legislation, the NGRI individual cannot be committed unless he is dangerous, and he has the right to review of his commitment and can petition for his discharge. Additionally, the NGRI individual is not in legal limbo like Jackson. The NGRI individual has already completed his path through the criminal justice system.

---

[107] 406 U.S. 715 (1972).

[108] *Id.* at 719.

[109] *Id.* at 730.

[110] *E.g.*, Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd*, 411 U.S. 911 (1973); *see generally* Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 954-60 (1959); Note, *Civil Commitment of the Mentally Ill: Theories and Procedure*, 79 HARV. L. REV. 1288, 1289-95 (1966).

The issue which would be raised in a challenge to a statute like the model one is: "Is the equal protection clause of the fourteenth amendment of the United States Constitution violated by treating the person found not guilty by reason of insanity differently from other civilly committed persons?" The author would obviously answer in the negative. The past criminal behavior of the NGRI individual demonstrates his dangerousness to society and thus justifies treating him differently than the civil committee who has not engaged in such behavior.

The equal protection clause does not require treating all persons alike. However, this clause will become the starting point in any lawsuit challenging differentials in treatment between two groups that appear similarly situated. The United States Supreme Court has explained the requirements of equal protection:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.[111]

The most notable case which analyzed treating the NGRI individual differently for purposes of discharge was *United States v. Ecker*.[112] In *Ecker*, an issue raised was whether a provision of the laws of the District of Columbia, which required court review of a proposal for conditional release or discharge, violated the equal protection rights of the patient because he was treated differently than other civilly committed persons who could be discharged on the authority of the chief of the hospital. *Ecker* also challenged the fact that the court had to find that the NGRI individual was not likely to endanger himself or others in the reasonably foreseeable future, while the civil committee only had to convince the chief of the hospital that he was not likely to injure himself or other persons.

The *Ecker* court determined that the dangerousness demonstrated by the commission of a crime and acquittal by reason of insanity was a rational basis for the disparity in release provisions.[113] In further elaboration, the court held:

---

[111] McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1968).
[112] 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).
[113] 543 F.2d at 195.

> "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made," *i.e.*, "a reasonable justification." Subsection (d) patients are treated differently from other civil commitees [*sic*] because they are an "exceptional class of people" who have "already unhappily manifested the reality of anti-social conduct."[114]

The court then noted that it did not understand how independent judicial review of a discharge decision deprives the patient of any substantial right. Moreover, according to the *Ecker* court, that review is designed for the protection of the public against whom the acquittee already has been shown to have committed one or more criminal acts, thus differentiating himself from the civilly committed individual.[115] *Ecker* makes it clear, through its well-reasoned opinion, that a review of the discharge decision and ordering of a conditional release is appropriate for the NGRI individual, even though this procedure is not applied to other civilly committed individuals.

The issue which was not addressed in *Ecker* is whether a broader standard of commitment can be used when involuntarily hospitalizing an NGRI individual. The model legislation proposed in this article requires that, to involuntarily hospitalize a person found NGRI, the state would have to show that he was reasonably expected to be a danger to himself or others. This is broader than the standard in many states which requires that the person be expected to harm himself or another in the *near future*. The proposed standard, however, has the two elements essential to justify civil commitment: (1) an identifiable mental illness and (2) a showing that, as a result of that illness, the NGRI individual is likely to injure himself or others. It is well-recognized that the police power permits the state to civilly commit those who present a danger.[116] This author believes that a psychiatric evaluation which reveals that the NGRI individual might present a danger to himself or others, based in part upon his past behavior, is a standard sufficient to withstand constitutional attack on equal protection grounds.

Recently, the Supreme Court of Alaska was faced with a question of whether the state had to prove beyond a reasonable doubt that the defendant who was found not guilty by reason of insanity was suffering from a mental disease which rendered him a danger to society.[117] The court felt that equal protection did not require the state to use the same standard as that used for civil commitment when there was a rational basis for doing otherwise. The court stated:

---

[114] *Id.* at 197 (citations omitted).

[115] *Id.* at 198.

[116] *See* note 110 and accompanying text *supra*.

[117] Alaska v. Alto, 589 P.2d 402 (Alaska 1979).

> The acquittee by reason of insanity has, by his affirmative defense, admitted that he was insane at the time of the act in question and he has presented evidentiary support for his admission. Such an admission distinguishes the acquittee by reason of insanity from one whose involuntary commitment is civilly sought and has consistently maintained that he is not mentally ill. Moreover, the acquittee by reason of insanity has committed a criminal act. He therefore differs from the civil committee who is confined because of his potential to commit dangerous acts, not because he has committed them.[118]

Equal protection only requires that differences in treatment between two groups have relevance to the purpose for which the classification was made.[119] It is clear that the legislature can justify, based upon admitted past criminal behavior, different treatment for the NGRI individual when entering and being discharged from the mental health system.

CONCLUSION

The present state of the law relating to the insanity defense requires that most states adopt procedures to follow when someone has been found not guilty by reason of insanity. The procedures discussed in this article are aimed at providing treatment to the NGRI individual and assuring the public's safety. The procedures which are necessary would provide for a broader standard of commitment, review of a recommendation for discharge from the state department of mental health, and provisions for the court to order outpatient care under court supervision.

The differentials in treatment for the NGRI individuals can be justified based upon the past admitted criminal behavior of the acquittee. This behavior provides the legislature with the rationale for adopting different laws relating to the NGRI individual as compared with other civilly committed mental patients. This rationale will be sufficient to withstand challenges based upon denial of due process or equal protection.

---

[118] *Id.* at 406.

[119] United States v. Ecker, 543 F.2d 178, 197 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

APPENDIX A

TEST USED TO DETERMINE CRIMINAL RESPONSIBILITY

	TEST		TEST
Alabama	Combination ALI & M’Naghten	Mississippi	M’Naghten
Alaska	ALI	Missouri	ALI
Arizona	M’Naghten	Montana	ALI
Arkansas	ALI	Nebraska	M’Naghten
California	M’Naghten with Diminished Responsibility	Nevada	M’Naghten
Colorado	M’Naghten & Irresistible Impulse	New Hampshire	Durham
Connecticut	ALI	New Jersey	M’Naghten
Delaware	ALI	New Mexico	M’Naghten
District of Columbia	ALI	New York	M’Naghten
Florida	M’Naghten	North Carolina	M’Naghten
Georgia	M’Naghten	North Dakota	ALI
Hawaii	ALI	Ohio	ALI
Idaho	ALI	Oklahoma	M’Naghten
Illinois	ALI	Oregon	ALI
Indiana	ALI	Pennsylvania	M’Naghten
Iowa	M’Naghten	Rhode Island	M’Naghten
Kansas	M’Naghten	South Carolina	M’Naghten
Kentucky	ALI	South Dakota	ALI
Louisiana	M’Naghten	Tennessee	ALI
Maine	ALI	Texas	ALI
Maryland	ALI	Utah	ALI
Massachusetts	ALI	Vermont	ALI
Michigan	ALI	Virginia	ALI
Minnesota	M’Naghten	Washington	M’Naghten
		West Virginia	ALI
		Wisconsin	ALI
		Wyoming	ALI

APPENDIX B

STATE PROCEDURES AFTER FINDING OF NOT GUILTY BY REASON OF INSANITY

	AUTOMATIC COMMITMENT	IS OUTPATIENT CARE POSSIBLE	COURT APPROVAL FOR RELEASE
Alabama	If court deems necessary	No	No
Alaska	No - court must find dangerous to public	No	Yes
Arizona	Civil commitment hearing	No	No
Arkansas	No	Yes	Yes
California	No	Yes	Yes
Colorado	Yes	No	No
Connecticut	Yes	Yes	Yes
Delaware	Yes	No	Yes
District of Columbia	Yes	Yes	Yes
Florida	No	Yes	Yes
Georgia	Yes - 30 days	No	Yes
Hawaii	No	Yes	No
Idaho	Yes	Yes	Yes
Illinois	Hold hearing under MHC	Yes	Yes
Indiana	Hold hearing under MHC	No	No
Iowa	No - must find person dangerous	No	
Kansas	Yes	No	Yes
Kentucky	No	No	No
Louisiana	Yes	Yes	Yes
Maine	Yes	No	No
Maryland	Yes	Yes	Yes
Massachusetts	Yes	No	Yes
Michigan	Yes	No	No
Minnesota	Yes	Yes	Yes
Mississippi	Yes	Yes	Yes
Missouri	Yes	No	Yes
Montana	Civil hearing held	Yes	Yes
Nebraska	Civil commitment hearing	No	No
Nevada	Yes	No	No
New Hampshire	No	No	No
New Jersey	Yes - civil hearing held	Yes	Yes
New Mexico	No	No	No
New York	Yes	Yes	Yes
North Carolina	Civil commitment hearing	No	No
North Dakota	No	No	No
Ohio	Civil commitment hearing	No	Yes
Oklahoma	Civil commitment hearing	No	No
Oregon	No - hearing and at a minimum civil discharge	Yes	Yes
Pennsylvania	Civil commitment hearing	No	No
Rhode Island	Civil commitment hearing	No	Yes
South Carolina	Civil commitment hearing	No	No
South Dakota	No - civil commitment hearing	No	No
Tennessee	Yes - civil commitment hearing	Yes	No
Texas	No - hold hearing under MHC	No	No
Utah	Yes	No	Yes
Vermont	Civil commitment hearing	No	Yes
Virginia	Yes	No	Yes
Washington	Yes	No	No
West Virginia	Yes	No	Yes
Wisconsin	No - court holds hearing	Yes	Yes
Wyoming	No - court holds hearing	Yes	Yes

Senator **Specter**. What is the reality of the predictability as to whether a person is dangerous to the community?

Dr. Steadman, may we call on you to address that question?

Dr. **Steadman**. Yes.

Senator **Heflin**. Before we do that, could I ask Professor Ellis a question?

Senator **Specter**. Of course, Senator.

Senator **Heflin**. I do not remember now the present law. Is there a civil hearing set for commitment following a not guilty by reason of insanity in the Federal law; that is, you would have to go through a commitment procedure or is it an automatic commitment under this statute that will be reviewed every 50 days hence? Is that existing statute?

Mr. **Ellis**. As it stands now, in my understanding the person who has been found not guilty by reason of insanity of a Federal crime in Federal court is then committed in the State court or the District of Columbia court, but that there is not a separate Federal civil commitment statute or procedure in the Federal law for the confinement of an individual who has been found not guilty by reason of insanity. That person is then, by whatever physical mechanism, turned over to the State to proceed under their law. There are two possibilities then.

One, that the State has only one civil commitment law for everybody—there are some 19 such States; the other is that the State has a separate procedure for people who have been found not guilty by reason of insanity, one that is more restrictive, as we have been discussing.

Whether or not every Federal defendant is eligible under that more restrictive State statute, is not entirely clear. There have been proposals, although not many statutes, what limit that more restrictive system to people who have been acquitted of violent crimes, and not every Federal defendant who has succeeded in the insanity defense will have been charged with a violent crime.

Senator **Specter**. Senator Heflin, we had some testimony on that this morning by Judge Tjoflat before you had a chance to arrive; and Judge Tjoflat pointed out that had Hinckley been in any other Federal court—for example, had he been in Birmingham and had been acquitted by reason of insanity—he could have walked right out of the court without any detention at all and there would have to be some other mechanism for detaining him, which creates a gap, which I think our subcommittee will address.

Senator **Heflin**. Well, I would like to ask the professor this: Is it possible to have as a part of the criminal trial some determination by a judge or by the jury of either—I am not advocating this, just thinking out loud—"not guilty by reason of insanity but recovered" or "not guilty by reason of insanity but requires detention and treatment"? Could you have the effect of this adjudication be a legal peg to hang your hat on in regards to detention and treatment?

Are there problems with, say, a judge or a jury making such determination which would give you the right in effect to say that there has been some adjudication?

Mr. **Ellis**. I think there are two key elements in this problem, as it is arising now.

One is determining, as a constitutional matter, what is it that the Government has learned from an insanity acquittal that gives it greater power than it would ordinarily have to confine the defendant.

The second factor here is that the civil commitment laws of the States are radically different than they were a dozen years ago. The ordinary civil commitment statutes now give respondents or defendants a much greater array of rights than they previously had, they are more protective of defendants, put the State to its proof more rigorously, and require periodic review more frequently. Thus our previous experience that essentially everyone who was found not guilty by reason of insanity would base a very long period of civil commitment, possibly lifelong commitment, just by the ordinary working of the civil commitment statutes, may be less true today.

Thus there may be incentive to set up a separate system of commitment for these defendants, whether on the State or the Federal level, which is more protective of the public safety. To justify that more protective system, we have to have learned something about that defendant that distinguishes him from the ordinary civil patient.

The structure of the verdict may be important there. If, for example, the verdict tells us that the jury could not have found the defendant not guilty by reason of insanity unless they first found beyond a reasonable doubt that he physically committed the act and met all the other elements of the crime, not guilty by reason of insanity is unavailable to them; they must find him simply not guilty. Then we have learned a good bit about that insanity-acquitted defendant, which warrants the Government in applying more protective of the public procedures.

If, on the other hand, we have not learned anything from the verdict and it is simply an undifferentiated not-guilty verdict for everybody, it is more difficult to justify more protective procedures. I am not an expert on Idaho law, but speaking to the question that was put to the attorney general, in a system in which there is no insanity defense and where the issue of mental state is only raised with regard to mens rea, the tea leaves that we get from the jury verdict are awfully obscure. We have not learned much about that defendant that warrants us using something other than general civil commitment procedures which may in fact be a system in which it is difficult for the State, on a repeated basis in periodic review, to keep the person in confinement. That is certainly not an intended consequence of abolition of the insanity defense but it seems to me it is a likely consequence.

Senator HEFLIN. But if you want to have it, if there is a not guilty by reason of insanity determination, in the trial itself, to give you the legal grounds for the commitment for detention, will there be a constitutional impediment first of a judge making that determination; second, of a jury making that determination.

Mr. ELLIS. I am not sure exactly the nature of the proceeding that you are inquiring about.

Senator HEFLIN. Well, say you consider a jury verdict. Instead of having "not guilty by reason of insanity" you would have "not guilty by reason of insanity but recovered" under which many would go loose. Then you would have another one saying "not guilty by reason of insanity or mental illness and requires confinement, detention, and treatment," or some words to that effect. Or, on the other hand, you might have a judge—there generally is not a jury trial in civil commitment proceedings—having heard the evidence would in effect say that there is, from the evidence received and heard by the court, a basis for confinement under requirement, periodic review and all that, but in effect it is something that occurs in the trial that prevents a writ of habeas corpus to turn him loose immediately thereafter.

Mr. **Ellis**. It seems to me that would be possible but I am not certain that it would be desirable. The reason being that these trials are difficult trials in any event, in terms of the nature of the testimony. We have recently seen that.

To accomplish what you are suggesting, it seems to me, Senator, you would have the jury oi the factfinder determining two different psychaitric questions; first, what was the state of the defendant's mind at the time he committed the act; and second, what is the state of his mind now at the time of the trial?

I think that the letter can better be accomplished by a subsequent proceeding. What may be required in the unique case of the Federal system—and we are talking here about a very small number of defendants—but for those Federal defendants who have been acquitted of the Federal charge by reason of insanity, you may need some more explicit mechanism by which they can be held, evaluated and brought to a civil commitment proceeding. Whether that proceeding would be a State proceeding or something new that you might enact as a Federal proceeding for those defendants.

Senator **Heflin**. Well, suppose you invented the Federal proceedings and did not leave that up to the jury, but you left it up to the judge? Whether the judge on his own motion could raise the issue or whether you would require immediately thereafter a question by the prosecution raising the issue of his insanity and his further detention, pending whatever procedure might have—I am just looking at the situation under this Idaho situation where he is found not guilty and you go to civil commitment. I am fearful that you could have all types of maneuvering going on and appeals possibly and other things else.

We also are under a situation of where, under the Federal court, if we turn it over to the State, you have got possibly 50 different applications. It seems to me that there needs to be some mechanism where by the judge having heard the evidence, would certainly be in a position of taking preliminary action and it would appear that you would need some type of a Federal approach toward it rather than turning it over to the State on the question of civil commitment.

Mr. **Ellis**. In trying to answer your question, let me try to come at it from a little different direction.

I spoke a moment ago about what we learned from the insanity verdict, in a hypothetical case. Whether we learned anything about the defendant's current state of mind. It seems to me that we learned something if there has been an explicit finding not guilty by reason of insanity. Again, Idaho presents a different situation. It seems to me we learned enough that a presumption can be raised with regard to civil commitment which would allow, if statutes so provided, the judge to order the person immediately confined, for a period of evaluation of his current mental state, so that you do not have a gap of time in which the custody of the defendant is uncertain. I think that there is enough of a presumption arising from an insanity acquittal to warrant that without a full blown hearing on the current mental state at the moment the jury or the judge comes in with its criminal verdict.

Is that responsive to your question, Senator?

Senator HEFLIN. Yes, I think so.

You do not see any constitutional impediment, as a part of the criminal trial or as a judge aftermath of the criminal trial, in the preliminary holding of a defendant under the evidence that was received in a criminal case?

Mr. ELLIS. For so long a period of time as might be thought reasonable to accomplish an evaluation, it seems to me, and the courts have held, that that kind of order following a verdict is acceptable. Were that statute to authorize the person to be held for a longer period of time, a year or two, then it seems to me that that would be excessive because it would not be reasonably related to the purpose of evaluation and *Jackson* v. *Indiana* [1] teaches that it has to be reasonably related.

Senator HEFLIN. Thank you.

Senator SPECTER. Dr. Steadman, we return to you. We have your testimony. I appreciate your having submitted it in advance and it will be made a part of the record fully.

As these hearings proceed, you will see that the committee directs its attention to matters which are of greatest concern as we are hearing the testimony. So that it does not lend itself at all times to a systematic documentation as to what you might prefer to do, to the extent that you can integrate that in the response to the question, it would be useful and we do not want to unduly restrict you as you present your views to us, but the issue which is of great concern is how predictable is any conduct by someone who has been declared not guilty by reason of insanity; so that we can try to have some guidance as to how we know whether a person is going to be a danger to the community and you have written extensively and studied the subject extensively; so we would appreciate your view on that test subject.

Dr. STEADMAN. The written testimony, which you did receive in advance, is somewhat different in its thrust, as you are well aware. A couple of points from that which I think are very germane to the issue of release criteria relates to an erroneous perception that maybe we are in need of special review procedures for insanity acquittals because they are returning to the street nearly as rapidly as someone who is admitted to the State mental hospitals as civil admissions.

The best example that I can give that this is in fact erroneous is that in New York State the average length of stay of a person admitted to the State mental hospital system is about 33 days. About 1 month.

---

[1] 406 U.S. 715 (1972).

The average length of stay of insanity acquitees is about 3½ years.

Now, it strikes me that that belies the point that in fact, they are rapidly returning to the street and are in fact, in terms of the release to the community, in the same class as most admissions to State mental hospitals.

Second, the vast majority of admissions to State mental hospitals in the United States are not admitted because of danger to self or others. They are voluntary admissions. They choose to come into the hospital. So again when we are talking about how does the insanity acquitee compare with the residents of the State mental hospitals, we are talking about a very small subset of all the residents in the State mental hospitals.

In terms of the predictability of future criminal activity on the part of the insanity acquitee, there is nothing of consequence in this population that makes them more or less easy to predict than any other person that would walk into this hearing room this morning. Violence or future assaultive behavior among the mentally ill is something that is clearly associated with public expectations of mental illness. The rate of arrest of the mentally ill in the United States is somewhat higher than the general population but that is a function that an increasing proportion of the State mental hospital population have former arrest records. Among the mentally ill, among the insanity acquitees, the factors which are related to subsequent violent behavior, the factors that are associated with subsequent criminal activity, are prior arrest records.

The factors associated with criminal behavior in the insanity population are the same factors that are associated with subsequent criminal behavior in the felon population; that is, if they have a long rap sheet, they have a very high probability of being rearrested. There has been no study of mentally disordered offenders or no study of mental patients which has demonstrated any correlation between psychiatric diagnosis, length of hospitalization, and the frequency with which violence behavior occurs when the person returns to the street. These are not psychiatric medical behavioral problems. They are something which is typical of any adult population in the United States.

Senator SPECTER. So where do we go from there?

STATEMENT OF DR. HENRY J. STEADMAN

Dr. STEADMAN. One place that we cannot go is to turn to an elaborate set of release criteria that depend on clinical predictions of future violent behavior by psychiatrists or other clinicians. There has been no study done in the United States or any place else, that shows any ability of clinicians, particularly psychiatrists, to accurately predict future violent behavior beyond the level of chance.

Senator SPECTER. Are judges less competent than clinicians?

Dr. STEADMAN. They are equally incompetent. That is, there is no person, there is no discipline—nurse, psychiatric nursing, psychiatric social workers, probation officers, parole boards, judges, psychiatrists, sociologists—there is no group that has demonstrated an ability to accurately predict future violent behavior, primarily because that behavior is so infrequent that we make a lot of mistakes.

Senator **Specter**. So are we wasting our time in having any release standards?

Dr. **Steadman**. We obviously have to have release standards, and obviously society is going to——

Senator **Specter**. How can we have a standard if there is no standard—how can we have a standard if there is no way to apply it.

Dr. **Steadman**. You could have a legal standard that flies in the face of the empirical evidence, which is what we have. We have legislation that is drafted——

Senator **Specter**. What is the empirical evidence?

Dr. **Steadman**. The empirical evidence is that if we draft legislation which depends upon a criterion of dangerousness to others as its basis, that it would stand no legal test.

Senator **Specter**. The empirical evidence?

Dr. **Steadman**. The empirical evidence shows that not even the "more probable than not" standard could be met by any professional group.

Senator **Specter**. The empirical evidence is that there is no empirical evidence.

Dr. **Steadman**. The empirical evidence is that psychiatrists and other clinicians cannot accurately predict beyond chance, beyond a 50–50 probability; that you and I could stand here and flip coins and we would be as accurate as with a clinician who makes these elaborate evaluations after 30- or 60-day commitments in a psychiatric in-patient facility.

Senator **Specter**. Well, is there any sense to a conclusion that someone who has committed an act of violence, is acquitted by reason of insanity is more likely to commit a subsequent act of violence than someone who has never committed an act of violence?

Dr. **Steadman**. There is not enough research evidence on that.

The field of insanity plea, in fact, does not have a very broad base of empirical evidence generally.

Senator **Specter**. With or without research evidence, is there a basis to form a professional judgment?

Dr. **Steadman**. The basis would be if a multidisciplinary team, looking at the entire history of violent events in this person's life were to do a relatively elaborate workup, that there may be some possibility of making an informed judgment where expert opinion could be presented to a court which would help the court, the ultimate decisionmaker, reach a decision, more so than if they did not have the evidence.

But to evaluate a person for 30 days, in an in-patient psychiatric center when there is no relationship shown between assaultiveness in a State hospital and assaultiveness in a community means, you are looking at the person in a very artificial situation. You are looking at the person in a situation where you are saying, given his behavior during this 30 days and given the offense which he admitted during the trial, what is the probability that he will commit a similar offense? If that is the first offense that that person has committed, there is a very low increase in the probability that he or she will commit that in the future.

Senator SPECTER. But some increase.

Dr. STEADMAN. Well, let us take a group that tends to occur among insanity acquitees, which is, at the same time, very infrequent elsewhere in the criminal justice system, that is, women who murder their children.

Now, if you put this woman back in the community after an insanity acquital, with her other six kids still in the home, with very little therapy having intervened, or changes in her economic and social circumstances, then I think any of us would suggest that there is a high probability that it could occur again.

On the other hand, if you chance the situation——

Senator SPECTER. Is that the experience?

Dr. STEADMAN. Pardon me?

Senator SPECTER. Is that the experience?

Dr. STEADMAN. There is none. I mean that type of decisionmaking, that type of research has not been done. This is where the research community is going. It is trying to get away from clinical, medical decisionmaking models and looking more at a situationally based approaches. Of course, even in this approach there are constitutional issues. In this hypothetical case, could you remove the other six children from the woman's home to lower her probability of future violent behavior? Long-term commitment to a maximum security, very expensive custodial facility may do her little good. With the situation changed, she could be returned to the community at much less cost to the State and also be very safe.

Senator SPECTER. What factors have you found, if any, that are indicative of a likelihood of future violent conduct? You mentioned prior arrest.

Dr. STEADMAN. Repetitive prior arrest, that is——

Senator SPECTER. What about age and prior commitments?

Dr. STEADMAN. Also age would be the second major factor. Younger persons, just as you would expect in any criminal population, with a long record of prior violent crimes are the people who have the highest probability of recidivism and the same holds true among the mentally ill.

[The prepared statement of Dr. Steadman follows:]

PREPARED STATEMENT OF HENRY J. STEADMAN

My goal in these few minutes is not to address the many, complex substantive issues of legal tests, the burden of proof and other similar issues of jurisprudence that experts before and after me will be discussing with this committee. Rather, my aim is to provide context for these other discussions through a very brief review of what has been documented empirically about the use and results of the insanity defense. In the absence of basic facts about how the insanity defense actually functions we must rely solely on clinical anecdote or media hyperbole from which informed public policy is impossible.

My review of the research on the insanity defense will deal with six basic questions:

1. How many insanity acquittals are there?
2. How many insanity pleas are there?
3. What factors are associated with a successful plea?
4. What are the crimes of which persons are acquitted by reason of insanity?
5. How long are insanity acquittees hospitalized and how does this compare with felons convicted of similar offenses and with defendants who are unsuccessful with insanity pleas?
6. What are the criminal recidivism rates of insanity acquittees?

At the outset it is important to note that relative to many other areas of scientific inquiry there is very little empirical data on the insanity defense. This is due in large part to the minimal or non-existent records kept by most states on acquittees because of an incredible lack of resources devoted to management information systems, program evaluation, and research on all segments of forensic mental health programs at the local, state and federal levels. In these times of severe fiscal constraints, money is spent to insure the secure detention of these types of patients, but rarely on sound management practices that would generate basic information on how the system is functioning in order to properly operate it.

How many insanity acquittals are there?

A recently completed survey of all 50 states by John Monahan of the University of Virginia and me[1] found that in 1978 there were 1,625 persons acquitted by reason of insanity and committed to some type of mental hospital in the U.S.

While this average is about 30 acquittals per state, there was wide variation from jurisdiction to jurisdiction ranging from no acquittals in Delaware, Iowa, North Dakota, South Dakota, West Virginia and Wyoming to 169 acquittals in California.

How many insanity pleas are there?

There are no national data on this question. There are no published state data on this question outside of data from 1971 to 1973 in Wyoming where 1 of 102 cases (.9%) was successful.[2]

A ten year study we have recently completed in Erie County, New York[3] found that from 1970 to 1980 there were 202 cases in which the defendant plead insanity of which 51 (25%) were successful.

The wide disparity of these figures suggests that there is wide variation across jurisdictions that makes any extrapolation from the national number of acquittals to the number of pleas tenuous. If the 25% figure is used, then an estimate of 6,500 pleas nationally would. be produced. If the Wyoming .9% is used, the national figure would skyrocket to 180,555 insanity pleas per year.

The most accurate perspective on the volume of insanity pleas may come from taking the number of insanity acquittals in New York for 1978 (N=55) and applying the Erie County success rate (25%) to it to project 220 insanity pleas statewide in 1978. This compares to 127,068 felony arrests statewide in 1978[4] for which insanity pleas were entered in but .17% of all felony cases.

What makes for a successful insanity defense?

Data from New York[5] and Missouri[6] suggest that the specifics of the crime and the demographic characteristics of the defendant make little difference in who is successful with an NGRI plea. The dominant factor in the court's decision is the finding of the psychiatric report. Contrary to the "battle of the experts" in a few widely publicized trials, the norm is for one set of clinical examinations to be done with the court following the reports submitted. Basically, what the clinicians recommend, the court does. The clinicians appear to weigh heavily a finding of psychosis in their conclusions. When a person has a history of mental hospitalizations and a diagnosis of psychosis the defendant is almost always found NGRI by the clinicians and, in turn, by the court. The crime, the number and type of victims, and other such items are not related to insanity acquittal. Generally, what the clinician recommends, the court enacts.

What are the crimes of which NGRIs are acquitted?

There are no national data on this question. There are five states in which data have been reported: Michigan[7] (1967-1972); New York[8] (1965-1978); New Jersey[9] (1976-1977, for one county); Missouri[10] (1978); and Oregon[11] (1980).

In the first two of these states, the most frequent crime among acquittees was murder. In Michigan, 57% of their acquittees were acquitted of murder and in New York 51% (which also included attempted murder). In these two urban states, assault was also frequent among acquittees (20% and 13%, respectively). Rape and other sex crimes were very infrequent (5% and 3%). Most other offenses were less serious property offenses ranging across the entire spectrum of crimes.

In New Jersey, Missouri and Oregon the number of serious crimes was sharply less than the other two states with available data. Respectively, 26%, 5% and 5% of their total acquittals were for murder. Less serious assaults (35%, 22% and 14%, respectively) along with a wide range of other less serious crimes predominated among acquittals.

In sum, there is wide variation on the seriousness of the crimes of insanity acquittees by jurisdiction. Minor offenses are always frequent among NGRIs and in some jurisdictions minor crimes make up the vast majority of all crimes. In contrast to public perceptions and media portrayals, all insanity acquittees are not assassins, rapists, deranged mutilators, or mass murders. It would be inappropriate to predicate policy on popular conceptions of acquittees.

How long are acquittees hospitalized?

The only data available on this question are from New York. The most recent data we have from our continuing work with Dr. Richard Pasewark of the

University of Wyoming are unpublished. They are the outcomes of 225 defendants acquitted between 1971-1976 who were followed through June, 1981. Of these 225, 133 had been released (59%), 15 escaped (7%), 8 died (4%), and 69 remained hospitalized (31%).

The average length of hospitalization for all 225 was 1,303 days (3.6 years). Those that had been released averaged 670 days before discharge (1.8 years). Those escaped averaged 749 days (2.1 years) and those still hospitalized averaged 2,645 days (7.25 years).

Again, there are no national data on these issues and it is entirely unclear how generalizable these New York data may be.

A related question is how the seriousness of the crime of which the defendant was acquitted is related to their length of hospitalization. In general, more serious crimes are strongly associated with longer hospitalizations. Data from both New York[12] and New Jersey[13] suggest that murderers and rapists spend much longer times hospitalized than say burglars or auto thieves.

Another related question is how the periods of hospitalizations for acquittees compared with what would have happened to them had they been convicted and incarcerated. We have recently reported data,[14] again from New York, which is all that is available on this question. A total of 50 insanity acquittees from 1971 through 1973 were compared with a group of 50 felons of the same age and sex admitted for the same offenses at the same time to the state prison system. Previously, we had also compared some NGRI and felon cases from 1965 through 1971[15]. Among the more recent groups of NGRIs and felons about the same proportion of both had been released (75%) after three years of follow-up. The NGRI cases were released after an average of 533 days while the felons averaged 837 days of incarceration. This difference contrasts with the information from the earlier era in which the NGRIs who were released averaged 1,021 days before release as compared to 995 days for the felons. It appears that a change in responsibility for the care and treatment of insanity acquittees in New York from the Department of Correctional Services to the Office of Mental Health was associated with a substantial decrease in the periods of hospitalization for NGRIs who were released. Whether this indicates some "soft on crime" attitudes or whether there was an appropriately increased reliance on medical criteria rather than criminal retributive ones cannot be determined from our data.

One other comparison of hospitalization lengths of insanity acquittees that we have conducted is with defendants who plead insanity, but were found guilty. These data, also from 1970 to 1980 in Erie County, New York[16], indicated that the successful insanity defendants averaged 891 days of hospitalization as compared with the convicted insanity defendants' 1,058 days of incarceration. Of course, it should be noted that of the 133 defendants convicted after an unsuccessful insanity defense, only 79 (59%) were incarcerated. This compares with 49 of the 51 (96%) insanity acquittees who were institutionalized.

What are the recidivism rates of released insanity acquittees?

Again, the only information available on the criminal behavior of insanity acquittees after their release from hospitals is from our New York studies. Among all 278 NGRIs admitted from 1965-1976, 107 had been released when we concluded that study. Of these 107, 21 (20%) had been subsequently arrested. Property crimes accounted for 36% of the total of 66 arrests, crimes against person for 20%, misdemeanors for 23%, drug charges for 14% and other felonies for 8%.

More recent unpublished data on the 1971-1976 NGRI cohort following them through 1981, found 28% had been rearrested with an average time at risk of about 5 ½ years. A total of 22% of the releasees had a felony arrest. The arrests ran the full gamut from murder (3 arrests) to drunken driving and violation of liquor sale laws.

Whether these rates are high or low or somewhere in between is a value judgement. By comparison, the recidivism rates of the NGRI subgroup that was compared with the felons found 24% of the NGRIs released from DOC hospitals being rearrested versus 27% of the comparable felons and 15% of the NGRIs released from OMH hospitals rearrested as compared to 18% of the felons. Clearly the insanity acquittee rearrest rates are about the same as felons of comparable age, sex, and current seriousness of criminal charges.

On the other hand, as compared to all patients in civil state hospitals in New York, the NGRI recidivism rates are very high. We found 9.4% of patients released from New York State mental hospitals were arrested over their first year and a half in the community[17]. While the NGRI follow-up periods were longer, their two and three times higher arrest rates suggest they are a distinct group from regular civil hospital patients in regard to their subsequent contacts with the criminal justice system. All of these rates are much lower than recidivism rates for defendants found incompetent to stand trial which run around 55%[18].

Conclusions

- Insanity pleas and insanity acquittals are exceedingly infrequent.
- The importance of insanity acquittals relates to their philosphical importance and the additional security and programmatic requirements the few insanity acquittees demand from mental hospitals rather than in the volume of cases.
- Public perceptions that all NGRIs are heinous, bizarre murderers and rapists is highly inaccurate.
- The average length of hospitalization of insanity acquittees currently is around 3 ½ years.
- Insanity acquittees may be hospitalized about the same length of time as comparable felons are incarcerated when NGRIs are the responsibilities of correctional agencies, but for somewhat shorter periods (6 months less) when under the auspice of mental health agencies.
- The more serious the crime of NGRIs, the longer they remain hospitalized. This relationship would not necessarily hold if medical criteria rather than criminal retribution or dangerousness were used to determine their release.
- The data suggest the release of NGRIs is contingent primarily on non-medical factors associated with society's fear of the mentally ill and what is thought to be appropriate lengths of detention for the crime of which the defendants were acquitted.
- The practice of linking detention in hospital to past criminal behavior and to predictions of future criminal behavior turns mental hospitals housing insanity acquittees into facilities of preventive detention that fly in the face of other American principles justifying medical intervention and criminal detention.

FOOTNOTES

1. Steadman, H.J., Monahar., J., Hartstone, E., Davis, S.K., & Robbins, P.C. Mentally disordered offenders: A national survey of patients and facilities. Law and Human Behavior. In Press.

2. Pasewark, R.A. & Lanthorn, B.W. Disposition of persons utilizing the insanity plea in a rural state. Journal of Humanics, 1977 (5): 87-98.

3. Steadman, H.J., Keitner, L., Braff, J., & Arvanites, T.M. Factors associated with a successful insanity defense. American Journal of Psychiatry. Forthcoming.

4. NYS Division of Criminal Justice Services. Annual Report 1978 Crime and Justice. "Reported Felony Arrests NYS 1976-1978 by Quarter". p. 162.

5. Steadman et al. footnote 3.

6. Petrila, J. The insanity defense and other mental health dispositions in Missouri. International Journal of Law and Psychiatry, 1982 (1): 81-102.

7. Cooke, G. & Sikorski, C. Factors affecting length of hospitalization in persons adjudicated not guilty by reason of insanity. Bulletin of the American Academy of Psychiatry and the Law, 1974 (2): 251-261.

8. Steadman, H.J. Insanity acquittals in New York State, 1965-1978. American Journal of Psychiatry, 1980 (137): 321-326.

9. Singer, A. Insanity acquittals in the seventies: Observations and empirical analysis of one jurisdiction. Mental Disability Law Reporter, 1978 (2): 406-417.

10. Petrila footnote 6.

11. Rogers, J.L. & Bloom, J.D. Characteristics of persons committed to Oregon's psychiatric security review board. Paper presented at the annual meeting of the American Academy of Psychiatry and the Law. San Diego, CA., October, 1981.

12. Steadman footnote 9.

13. Singer footnote 8.

14. Pasewark, R.A., Pantle, M.L. & Steadman, H.J. Detention and rearrest rates of persons found not guilty by reason of insanity and convicted felons. American Journal of Psychiatry, 1982 (139): 892-897.

15. Pantle, M.L., Pasewark, R.A., & Steadman, H.J. Comparing institutionalization periods and subsequent arrests of insanity acquittees and convicted felons. Journal of Psychiatry and Law, 1980 (3): 305-317.

16. Braff, J., Arvanites, T.M., & Steadman, H.J. Detention patterns of successful and unsuccessful insanity defendants. Unpublished.

17. Steadman, H.J., Cocozza, J.J., & Melick, M.E. Explaining the increased arrest rate among mental patients: The changing clientele of state hospitals. American Journal of Psychiatry, 1978 (135): 816-820.

18. Steadman, H.J. Beating a Rap? Defendants Incompetent to Stand Trial. Chicago: University of Chicago Press, 1979.

Senator **Specter**. Dr. Silver, we have not given you an opportunity to address these issues up to the present time. We welcome you here. We know that you are a Philadelphian and a graduate of Central High School, and I believe you have some subsequent qualifications to support your expertise. [Laughter.]

Dr. **Silver**. Thank you.

Senator **Specter**. Would you address the question about what factors, if any, can provide some insights from the psychiatric profession as to future violent conduct?

STATEMENT OF DR. STUART BEAL SILVER

Dr. **Silver**. Thank you, Senator. Thank you for the opportunity to speak.

I do not have the elaborate research apparatus that the State of New York has. We do not have that in Maryland. So my data must be interpreted somewhat gently. But we do have some data about experience with insanity acquittees in Maryland.

Maryland is a State that has a large number of insanity acquittees compared to other States. Our security facility is not significantly more costly than our regional hospitals, by the way. Just as an aside.

I would deviate from the prepared text, which outlines a rather traditional psychiatric approach to affording patients gradually increasing levels of responsibility.

Senator **Specter**. Yes, your prepared text will be made a part of the record in full, and if you will direct your comments to the specific points of inquiry, we would appreciate it.

Dr. **Silver**. I will do so.

Senator **Specter**. Thank you.

Dr. **Silver**. But as I say, the text only points out the traditional psychiatric increasing responsibilities and gaining experience with the patient's actual behavior as criteria of dangerousness. We cannot predict the occurrence of future dangerous acts as individual acts. We have very low ability to do that and I agree fully with Dr. Steadman in that regard. We do have some sense about dangerousness as a potential that exists in anyone and the degree to which that potential might exist, although we cannot say for sure when someone is going to do something; we can say that this truck with gasoline is more dangerous than this truck with wheat. And some of the experiences that we have had and some of the data that we have had supports this.

To begin with, we have not experienced a great change in the insanity defense in Maryland in recent years. We have 4 million people in Maryland; we find 40 to 50 insane on felony charges a year. It has been very stable. We have an average length of stay of about 900 days in the hospital for such patients which, of course, is very different from the civil commitment groups as Dr. Steadman pointed out.

In Maryland we occupy 150 to 160 psychiatric maximum security beds with these patients. We follow about 80 or 90 of them as outpatients. We do have in Maryland what is unique, I think in the United States—certainly not widespread—a 5-year conditional release.

A patient who is found not guilty by reason of insanity, upon his release from inpatient care is put on a very strictly defined conditional release program. During that time, he can be returned to the hospital by bench warrant if he fails in meeting the conditions of his release or if it appears that his release needs otherwise to be modified, he can be returned to the hospital, reevaluated and either retained or the conditions modified.

We think that this is an extremely important part of the law given the recurrent nature of mental illness.

In Maryland, this conditional release can be extended. For example, if at the end of 5 years it would appear that it would be prudent that the person be followed by such stringent followup measures for another 5 years, we can petition the court for an extension and we can do so every 5 years until the person is very old.

Now, looking at the data that I have supplied; the demographic characteristics of insanity acquitees in Maryland I do not think are particularly different from other States. Most of them are young people; 50 percent white; 50 percent nonwhite; mostly Protestant; mostly poorly educated; half married; 30 percent served in the Armed Forces; 60 percent honorable discharge. About 60 percent have had prior hospitalizations; about 50 percent have had prior incarceration.

We did not find in the study of 65 of these people a significant correlation between prior incarceration and how they did in followup for 2 years—so that people who had been incarcerated a number of times before their finding of insanity, did not do significantly worse than those who had no prior incarcerations. It surprised us. It just was not significant. We cannot say anything about it beyond that.

The types of offenses in Maryland are in general, I think, comparable to other States. We have 65 percent of our not guilty by reason of insanity patients charged with assaultive offenses; murders, assault with intent to murder, assault. A small percentage with sexual offenses, a variety of sorts, and the balance, miscellaneous felony offenses. There is 75 percent diagnosed as schizophrenic. The traditional psychiatric treatments are applied in the hospital with one unique feature, that about 50 percent of our insanity acquittees are treated by the same therapist throughout their entire hospital stay and also followed by the therapist in the community.

We think this helps.

Now, statistically significant variables in the aftercare of these insanity acquittees. This is from our look at 65 insanity acquitees and 2 years followup. These were the only ones who approach statistical significance, although not highly significant.

Only one was at the 0.001 level, which is considered of research level significance.

Senator **Specter**. What is research level significance?

Dr. **Silver**. In research papers, the probability that such a set of circumstances would happen by chance, they like to see 1 chance in 1,000. In other words, 999 times out of 1,000 it would not happen by chance. That would indicate that it is very likely related to the variables in the study.

Senator **Specter**. 999 times out of 1,000 would not happen by chance?

Dr. **Silver**. Exactly. That means that—I do not know if I am making myself very clear here. But the chances of this set of circumstances would happen by chance, at the highest level of probability, would be 1 in 1,000. That is real good statistical data.

This statistical significance is marginal. We are talking about maybe 1 in 100 probability of it happening by chance. I do not know if that makes sense or not.

Senator **Specter**. What you are saying, if it is only a 98 probability, it does not qualify for your standards?

Dr. **Silver**. It is considered in the scientific circles to be marginally significant. Not clearly significant. They require high levels of——

Senator **Specter**. The Congress may act with lesser certainty on issues than that.

Dr. **Silver**. The variables that we found to have this limited level of significance—one had to do with the question of whether the person who was discharged from the hospital was on medicine. If the patient was able to be managed without medication, and if we followed the patient in the community on no medication, they tended to do better than those people who required medication after their discharge from the hospital. The criteria which we used for doing better include: One, they had no new charges; two, they had no rehospitalization; and, three, they had no incarceration. So by those criteria, we found that 70 percent of our discharged patients who were not on medicine, did well.

Now, another point that needs to be considered is that of the group that was on medication, of those that were noncompliant, only 16 percent did well. If a patient needs medicine and he is not compliant, he stands a very, very high probability, at least based on these limited data, of not doing well.

Senator **Specter**. What insight does all of this give us in trying to evaluate people who have committed acts of violence, those who have been declared sane, not guilty by reason of insanity and making some determination as to whether they are likely to engage in future acts of violence.

Dr. **Silver**. This data——

Senator **Specter**. We really cannot await legislative judgments if we have to be certain 999 times out of 1,000. If those are the standards of a scientific validity, we would do nothing.

Dr. **Silver**. These data give us some ideas of variables, which are important in considering a person's likelihood to do well after discharge from a hospital. They are suggestively valid. I do not have as rigorous scientific proof as I would like.

Senator **Specter**. What help can they give to this committee in trying to make a determination as to whether a person is likely to engage in competitive acts of violence?

Let me address that question, as a concluding question to the entire panel.

What help can studies, in your experience, professional background, give to the Committee in looking at that problem, which is the essential issue we are trying to find here.

Dr. **Silver**. If I can respond to that, it gives you some notion of the sorts of things that are important in insuring against outbreaks of violence in people who are discharged.

One of the conditions you asked earlier for was what parameters might be important to legislation, for example, in defining more stringently under what the conditions an insanity acquittee should be at liberty.

For example, we found if they are not employed, if they are not employable, and cannot hold a job, ,they do significantly less well. Those that were employed, 71 percent of them did well; those that were not employed, 39 percent did well. And by doing well, I reiterate, no new charges.

[The prepared statement of Dr. Silver follows:]

PREPARED STATEMENT OF STUART BEAL SILVER

TREATMENT AND AFTERCARE FOR INSANITEE ACQUITTEES IN MARYLAND

Clifton T. Perkins Center is a 246 bed psychiatric hospital designed to minimize elopements and is staffed for both treatment and security obligations. Male patients are received from correctional facilities, detention centers, and other hospitals. Such patients are often extremely volatile, acutely ill, assaultive, and difficult to manage. At Perkins, one of our responsibilities in treating mentally disordered offenders is recommending their discharge from the inpatient unit to outpatient care. Assessment of their dangerousness or degree of unpredictability is an important clinical function. We are aware that many studies have shown that mental health personnel do not accurately predict the occurrence of dangerous acts. Assessment of dangerousness is, in our view, more indicative of a potentiality than predictive of an event.

What has evolved at Perkins is a system by which the patient's environment is gradually expanded and his behaviorial options increased. In the patient's movement from a tightly monitored admissions unit to a less severely restricted residential unit, both he and the staff of the hospital are afforded increasingly open opportunities for the discovery of each other's degree of predictability.

As the staff and patient study each other, as the patient's capacity for understanding increases with treatment, and as the hospital permits him to spend time outside the security area, many chances for unexpected behavior are afforded. It is in this fashion that the sense of dangerousness becomes mediated by actual experience. The degree of remission of illness and predictability of behavior which the treatment team at Perkins accepts as sufficient for a patient's release to the community may be seen by some as too restrictive and by others as too lenient. Often the matter is tested at a court hearing.

Finally, when a patient is ready for discharge from Perkins, he must be interviewed at a staff conference attended by representatives of all disciplines in the treatment team - psychiatry, social work, nursing, psychology, and rehabilitation services. There must be consensus concerning his readiness for discharge. The staff contracts with the patient a mutual expectation for follow-up treatment which will be in force for five years. This so called conditional release program further minimizes the risk of untreated recurrence of the mental disorder.

I have outlined how we at Perkins predict dangerousness. What it amounts to is the conversion of future uncertainty to current trust.

Attached to this statement are data reflecting the nature of our patient population and our outcome experiences. The five-year conditional release program incorporates a mechanism for returning a patient to the hospital if his condition or treatment compliance deteriorates. We view consistent follow-up of this group of patients as essential to our favorable recidivism experience.

Most importantly, however, is the careful selection for admission of those whose offenses are clearly linked to severe mental illness. It is, in our view, important that this very small but definable group be managed medically - they will do better, the community will be safer, and the prisons will be less disrupted as a result.

INSANITY ACQUITEES IN MARYLAND*

(FY 1979 - 1982)

(FELONY OFFENSES - CIRCUIT COURT)

DATA FROM CLIFTON T. PERKINS HOSPITAL CENTER

FISCAL YEAR	1979	1980	1981	1982
Number of admissions (all categories)	409	459	415	413
Number of persons adjudicated NGBRI	48	31	47	43
Average length of stay for those discharged in reference year (days)	880	912	749	961
Estimated average number of security beds occupied by insanity acquittees	141	156	155	157
Number of insanity acquittees on conditional release at close of year	92	83	87	81

*(Population - 4,216,446)

CHARACTERISTICS OF 65 INSANITY ACQUITTEES

Age	75% Between 21 & 40
Race	50% White, 50% Non-White
Religion	70% Protestant
Education	50% Entered High School, 20% Beyond High School
Careers	50% Unskilled Labor, 10% Professional or Managerial
Social	50% Married, 50% Childless
Military	30% Served, (67% Honorable Discharges)
Substance Abuse	50% Denied
Alcohol	20% Used
Prior Hospitalization	60%
Prior Incarceration	50%

OFFENSES

Murder	25%
Assault w/i Murder	25%
Assault	15%
Rape & Sexual	15%
Arson & Theft	10%

DIAGNOSES

Schizophrenias	75%
Personality Disorder	10%
Retardation	10%
Other	5%

INPATIENT MODALITIES

Regular Medication	75%
Individual Psychotherapy	60%
Group Psychotherapy	70%
Other Programs (Education/Rehabilitation)	100%
Continuity of Care (Same Therapist Throughout Stay)	50%

STATISTICALLY SIGNIFICANT VARIABLES IN THE AFTERCARE OF 65 INSANITY ACQUITEES

VARIABLES	NUMBER OF PATIENTS	PERCENTAGE DOING WELL*
ON MEDICATION		
Yes	35	43%
No	30	70%
(Yes - non compliant)	6	16%
EMPLOYED DURING OUT-PATIENCY		
Yes	34	71%
No	31	39%
OPINION OF STAFF REGARDING BENEFITS OF HOSPITAL TREATMENT		
Positive Gains	44	71%
Marginal	11	21%
No Systematic Gains	7	29%
ABLE TO LIVE ALONE OR WITH FAMILY VERSUS NEED FOR HALFWAY HOUSE		
Community	44	61
Halfway House	21	43

*1. No new charges
2. No incarcerations
3. No rehospitalization

AUDIT RESULTS AS OF SEPTEMBER, 1979
ON FIVE YEAR CONDITIONAL RELEASE PROGRAM
(72 PATIENTS SURVEYED)

INCLUSION CRITERIA:

All patients entering conditional release between January 1, 1973 and January 1, 1976. All were followed at least through December 31, 1978.

MINIMAL JUSTIFICATION CRITERIA:

1.	No assaultiveness at least three months prior	97%
2.	Participating in major hospital programs (i.e. work, school, training) at least three months prior	98.5%
3.	Written discharge plan	100%

OUTCOME CRITERIA:

4.	Remained in structured activity (i.e. work, school) after discharge with no more than a six week continuous hiatus and not discharged from job for poor performance	78%
5.	Maintained agreed upon residence or obtained staff concurrence in plans to move	89%
6.	Did not leave State of Maryland without staff approval	93%
7.	Regular follow-up attendance (at least 75% of appointments)	75%
8.	No involuntary psychiatric rehospitalization	89%
9.	No arrests	76%
10.	Took prescribed medicine with no more than a six week continuous period of noncompliance	87.5%
11.	No serious complications	97.5%

A. Conjoint discharge decision of hospital staff and court

B. Court deciding autonomously for discharge or overriding hospital's opinion

		A	B
# 7.	Follow-up Compliance	80%	33%
# 8.	No Involuntary Hospitalization	90%	78%
# 9.	No Arrests	80%	44%
#10.	Medication Compliance	90%	67%

Senator SPECTER. Professor Weiner?

Ms. WEINER. I think that the Maryland study, and our program in Illinois, the Isaac Ray Center, have both shown that if you do followup care on the person who has been discharged, who has been found not guilty by reason of insanity, you are not likely to have him get involved in repeated violent activity.

Now, I do not know whether these individuals would have gotten involved in repeated violent activity had they not been followed up, but I think the key factor is, and there have been studies to document this, that for mental patients to make it in the community successfully they must take their medication. In our program—which was modeled on the Maryland program, we feel the key to success, as measured by no repeated violent activity, is once they are discharged from the hospital, that mental health professionals are watching these people under court supervision. So for example, if our patients do not take their medication, do not keep their appointments, we can intervene immediately. We have had cases, about 20 percent of our patients are rehospitalized each year, most of them voluntarily but we have had cases where we have seen our patients deteriorating and exhibiting the same symptoms that they exhibited before they committed the act and we needed the intervention of the court. Since most of our patients, about 60 percent of our patients are murderers or attempted murderers we can't afford to have a repeat of their previous violent act.

I think there are two key things this committee can do: First, the acquitting court should approve the decision to discharge. Second, the court should be able to order mandatory court supervised outpatient care.

The judge addressed this morning the problems with the Federal system. Somebody is found not guilty by reason of insanity in the Federal system, he walks out the door. He might not be committed.

Senator SPECTER. Have you ever seen that happen?

Ms. WEINER. Yes, it has. It generally does not happen because the insanity defense is unlikely to be raised in Federal cases or raised successfully. However, you could have a case, and we had one in Illinois, where you have a particularly violent crime that has occurred in a VA hospital. You have a patient who goes crazy and stomps a nurse and another person to death; this is an actual case. He then is found not guilty by reason of insanity. I used to be an attorney for the State Department of Illinois and we hated taking these Federal people. The Departments position was, it is not our responsibility to take these people and treat them; that is another system.

So you had this individual who then gets in the State system where he was originally civilly committed, with no hold on him by the Federal court. At the 6-month review of the commitment he was going to be discharged. Fortunately the United States Attorney found out in time to stop it, but a judge had ordered his discharge, because he did not at that point meet the civil commitment standards. Although he was one of the most dangerous individuals our program had even seen.

You had a situation of one of the most dangerous people, facing the prospect of not only being discharged into the community, but being discharged with no one monitoring him.

Senator **Specter**. How did he satisfy the standards for release if he was so dangerous?

Ms. **Weiner**. He was not treated in the same way as other not guilty by reason of insanity people in Illinois were treated because he came from the Federal system. So he was reviewed by a judge in one of our southern counties in Illinois, who knew nothing of the facts of the criminal case, knew nothing about his past history. The psychologist testified that he was no longer dangerous.

Senator **Specter**. So they did not have all the facts?

Ms. **Weiner**. Correct, this is why the criminal court must review the discharge decision.

Senator **Specter**. But had they had the facts, would he have satisfied the requirements in this case?

Ms. **Weiner**. It is hard to know. If he committed the crime 3 or 4 years before, and the issue is what is his mental state now, and the doctor from the hospital says he has been a good boy in the hospital; he is doing fine, you might have real problems in keeping him locked up in the hospital.

Senator **Specter**. You said earlier that you had seen or knew of a case where someone was acquitted in Federal court by reason of insanity?

Ms. **Weiner**. This is the case I am talking about.

Senator **Specter**. Did that individual then actually walk out of the courtroom without being subjected to custody?

Ms. **Weiner**. What happened was he was down in southern Illinois; they were getting ready to discharge him from the hospital, and they said, gee, by the way, we ought to call the U.S. attorney and notify him and, the U.S. attorney in northern Illinois hit the roof and said, hey, wait a minute.

Senator **Specter**. But this is long after the day he was acquitted?

Ms. **Weiner**. Right. It was 6 days after the day he was acquitted. When he was acquitted, they went for civil commitment and succeeded.

Senator **Specter**. So he did not actually walk out of the courtroom?

Ms. **Weiner**. No, it would have been 6 months later had the U.S. attorney not known about this.

Senator **Specter**. Dr. Steadman?

Dr. **Steadman**. One final observation that I think that these aftercare programs and continuing care programs point out is that as best I could tell from the descriptions I have heard this morning and what I have heard about them previously, is that acquittees are put into these programs as a regular part of their treatment program, prior to full-scale release. Their entry into the program is not contingent upon a prediction. Rather, it is part of the normal course of treatment. We are not trying to identify a very small subset who have a high probability of recidivism. Rather, what we are saying is that within this group, we are going to miss some along the way by any technology we have available. But instead of trying to make predictions, when in fact we know that we cannot, let us instead mount a program which we know is effective, with some continuing monitoring and treatment and where people's admission in the program, is not contingent upon any medical prediction.

I think that is an important point; it is not contingent upon a special review board making a prediction that this person is in a high probability group and therefore they are going into aftercare. That is the normal course of treatment because it is known to be good medical practice.

Mr. ELLIS. If I could briefly address the question that you put to us——

Senator SPECTER. Yes.

Mr. ELLIS. The conclusion that Dr. Steadman has brought to you is fully supported by the literature. Both as a scholar and as a litigator I have had occasion to look at that literature and it suggests that the ability of clinicians to predict danger is much weaker than is popularly supposed. Yet the courts in the far more numerous cases involving ordinary civil commitments have continued to rely, and allowed legislators to rely, on predictions of dangerousness by a court which must base its conclusion, at least in part, on expert testimony from clinicians. That is a dilemma from which there may be no escape.

If you think about the defendants about whom we are speaking, the people acquitted by reason of insanity, the State has lost the ability to confine them because they were found not guilty of the crime. The only power the State has left is prospective; it is the protection of society—the protection of others—from dangerous acts that these people might commit in the future.

There are substantial constitutional problems with the implementation of such a standard. When does the State power expire, for example? There are all sorts of difficulties along the way. But the key problem is the one that Dr. Steadman raises: that all of this is based upon a foundation which is shaky and that we cannot turn to—

Senator SPECTER. Foundation which is shaky?

Mr. ELLIS. Shaky because we cannot turn to an expert and say, "What is this guy likely to do 3 weeks from Tuesday or any time within the next year or two?"

We can look to the experts and they can make their best judgment but it is not within the same order of magnitude of certainty within which scientific scholars require. From my perspective as a drafter of civil commitment statutes, for my State and other models, all I am left with is an attempt to structure the procedures in such a way that as much certainty as can be obtained from experts is obtained, and that the fact finder is as certain as he can be of the likelihood of future dangerousness. Perhaps some means can be found by which the clinician can bring to the fact finder those indicators suggested from the Maryland experience and elsewhere, that make it more likely that this person will commit dangerous acts.

What I am suggesting is that it would be nice for the courts to get out of the dangerousness-predicting business. But unless we are willing to say of insanity acquitees, that our concern with them and their possible future dangerous acts is over at the time of their acquittal, we must somehow cope with a system which affords them their constitutional rights but at the same time makes the best judgment we can about their future conduct in order to protect the public from those who are likely, in our best judgment, to commit a dangerous act in the future.

Senator SPECTER. Your basic conclusion is that we are now doing as best we can?

Mr. ELLIS. I think the States differ on that.

Senator SPECTER. Which is the best?

Mr. ELLIS. In a State that has civil commitment laws, which are very much tailored to putting the State to its proof, ordinary civil commitment laws oriented toward the defendant or the respondent, it may be necessary to set up a separate system for persons found not guilty by reason of insanity, for purposes of reassuring the public about its safety.

Senator SPECTER. So those are the worst.

Which are the best?

Mr. ELLIS. I am not sure that I can categorize them as worst or best.

I think the States that use the system for both, are fine because they have struck a balance. Other States may find that they cannot strike a balance that they find compatible for both groups and have to set up separate systems.

I think either would be acceptable. The problem comes when the legislature enacts a statute specifically for one group or the other and then applies it to both.

Senator SPECTER. From what you say, we are doing about as well as we can. And you said, no, some States are doing better. I am trying to find out which States are doing better so that we can take a look at those as a model.

Mr. ELLIS. I am not sure that I can offer a particular State whose statute would be appropriate for the unique system of the Federal Government. Your situation is somewhat different than the States' in that you are not proposing a civil commitment system which would apply to other people other than those found not guilty by reason of insanity. You do not have such people under the Federal jurisdiction.

Senator SPECTER. So your ultimate statement of that notwithstanding that some States are better than others, it is not relevant to the problem?

Mr. ELLIS. It is not relevant.

[Supplement to Mr. Ellis' testimony follows:]

SUPPLEMENT TO TESTIMONY OF PROF. JAMES W. ELLIS

The utility of State statutes as models for possible Federal enactments in this area is a subject which may merit a fuller response than I was able to give Senator Specter.

Some States have found it satisfactory to use the same procedural statute for the commitment of insanity acquittees and for all other civil mental patients. I cannot conclude that these States, which include my own, have come up with a "better" or "worse" resolution to the problem than have the States which have enacted separate procedures for the two groups of patients. But while these two approaches may be equally acceptable to the respective States which have adopted them, they do not have equal merit for service as models for possible Federal action.

The States with a unitary system must design that system in a fashion which satisfies the requirments of procedural due process in cases involving persons who have not come into contact with the criminal justice system. Thus they cannot employ the more restrictive provisions regarding release and periodic review which may be available in cases involving insanity acquittees.

Were the Congress to decide to enact a Federal statute specifying commitment procedures for defendants acquitted of Federal crimes by reason of insanity, it would not need to contemplate the constitutional and policy considerations which attach in cases of ordinary civil commitment patients. All persons whose commitment would be sought under this hypothetical Federal system would be insanity acquittees.

Therefore, a Federal system might well be modeled after the provision for acquittees in States which have separate procedures. Care must be taken, however, to make certain that the Federal statute met the due process requirements which the fifth amendment imposes regarding acquittees. Some of the provisions of the separate State statutes have run into contitutional difficulties in the courts. The constitutional hurdles for a Federal statute would be somewhat less certain because of the reduced relevance of equal protection (since there are no purely civil commitments under Federal law). The American Bar Association's draft standards on this subject constitute an attempt to satisfy those constitutional requirements while at the same time providing for the public safety. In their current tentative draft form, they have drawn upon the statutes of several States and attempt to reflect the growing body of Federal and State caselaw on point.

All of this presupposes that the Congress will choose to enact a new commitment statute for insanity acquittees, and I would like to suggest that there are reasons for considering alternatives to that course of action.

The number of defendants acquitted by reason of insanity by Federal courts is remarkably low. I believe that the statistics show that there are, on average, less than two dozen per year. All such defendants are acquitted in jurisdictions which have available some form of civil commitment procedures (whether unitary or separate) which can be employed to seek their confinement.

The possible enactment and employment of a new Federal commitment statute designed for exclusive use with Federal insanity acquittees would occasion a substantial amount of litigation. Each of the hypothetical law's major provisions would be tested in court. As I have suggested, the area of civil commitment is something of a constitutional minefield; due process considerations come into play at almost every turn. The caselaw is not currently so well or authoritatively developed as to permit certainty that the provisions drafted will pass constitutional muster.

Thus in order to provide for a remarkably small number of Federal acquittees—whose confinement is already possible under State law—the Congress would be burdening prosecutors and courts with a substantial amount of expensive and difficult litigation. (An example is the problem of what to do with defendants acquitted of nonviolent Federal crimes. If these defendants are excluded, the scope of the statute is narrowed still further. If they are included, a serious question arises whether the government has a sufficient interest in treating them differently than persons who have not come into contact with the criminal justice system—is it clear that they are more likely to be dangerous than others?)

All of this may suggest that consideration should be given to the possibility of enacting legislation which deals only with the issue of interim custody immediately following the Federal acquittal while State commitment is being sought. This approach would address the one real gap in current Federal law without undertaking the considerable difficulties inherent in the enactment and implementation of a new commitment statute.

Senator **Specter**. Thank you very much. I appreciate your being here.

[Whereupon, at 12:32 p.m., the subcommittee adjourned.]

APPENDIX

Psychological Issues & the Insanity Defense: Legal, Moral & Psychological Considerations

Stanley I. Gochman, Ph.D.

What is needed first, in order to adequately develop legislation with respect to the insanity defense is clarity about the issues involved, legal, moral and psychological. Since the Durham Case in 1954, the insanity defense has implied lack of criminal responsibility if the unlawful act of the accused "was the product of mental disease or mental defect." The problem is that "mental disease or mental defect" refer to concepts so broad and ill-defined that the terms are essentially meaningless.

The legal and moral issues in the insanity defense are whether the defendant is to be held responsible for a criminal act. At the basis of criminal law is individual responsibility (Rubenstein, New York Times, August 5, 1982). Dr. Thomas Szasz has pointed out that: "you have a constitutional right to be schizophrenic," but likewise, "you have the constitutional right to be protected from murderers." In the case of the insanity defense, says Szasz, responsibility for a crime is removed, by "psychiatric exculpation." Dr. Willard Gaylin (Washington Post, June 20, 1982), in a similar vein, writes that insanity has gradually come to be considered the equivalent of psychosis. Yet, psychosis is a very broad, ill-defined term for severe personality disorder, which may involve minimal to maximal degrees of loss of contact with reality, usually, but not necessarily, be characterized by minimal to maximal degrees of thinking disorder, delusions and hallucinations, and require minimal to maximal outpatient treatment or hospitalization, whereas, insanity is a legal term used in connection with "crazy" behavior, implying a lack of responsibility for one's acts (as well as an inability to manage one's affairs or to deal with reality).

In general, Gaylin points out, the legal view needs to encompass the moral view. An individual's behaviors must conform to socially sanctioned models, or the individual "must be held accountable for his violation of the code." He advocates a return to the post-1843 M'Naghten rules, requiring proof that the "accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know, that he did not know what he was doing was wrong." There would , he suggests, always be exceptional cases, which evidently and clearly call for exculpation and compassion, for example, if a murderer due to mental disorder, believed he was shooting at a melon instead of a person. And there would indeed always be "fuzzy cases at the borders," in which juries could express compassion yet also a sense of justice.

As stated by an English solicitor general in 1760: "My Lords, in some sense, every crime proceeds from insanity. All cruelty, brutality, all revenge, all injustice is insanity. There were philosophers in ancient times, who held this opinion... the opinion is right in philosophy but dangerous in judicature. It may have a noble and useful influence, to regulate the conduct of men... but not to extenuate crimes, not to excuse those punishments which the law adjudges to be their due" (cited by Gaylin).

The basic issue underlying the insanity defense however, and pertinent to the legal and moral issues raised above, is clarity with respect to the psychological issues involved.

For example, John Hinckley, would-be-assassin of President Reagan, was variously diagnosed in evaluations at Saint Elizabeths Hospital, as suffering from: "a severe, chronic mental disorder"; being a "danger to himself as well as to others"; a "pattern of fixed, grandiose, homicidal and suicidal ideas"; delusions about Jodie Foster acting as "organizing and guiding influences in his life"; "complicated and serious mental disorders -- including depression and detachment from reality";"in addition to major depression... symptoms of four types of personality disorders, primarily schizotypal personality disorder characterized by 'magical thinking' and bizarre fantasies";"symptoms of narcissism... a grandiose sense of self-importance and a constant desire for attention"; "features of schizoid and borderline personality disorders -- illnesses characterized by among other things, social isolation, impulsive behavior and manipulation, indifference and lack of emotion." In evaluations during his trial, he was variously diagnosed by the prosecution as suffering from: "various personality disorders... not severe enough to prevent him from abiding by the law or understanding that his attack on the President was wrong." In contrast, he was variously diagnosed by the defense as suffering from: "various forms of schizophrenia... characterized by a severe break with reality, delusions and major depression"; "he had a distorted notion that his act would somehow accomplish a 'magical union' with Foster"; and "among other things, borderline or ambulatory schizophrenia" (schizophrenia being another broad, ill-defined term for one form of psychosis, characterized by disturbances in thought and behavior, breakdown of integrated personality functioning withdrawal from reality and blunting and distortion of emotions).

It is abundantly clear that there are different definitions of psychosis, of schizophrenia and of other severe psychological disorders among various mental health professionals, both individually and collectively.

It should also be abundantly clear that there are different underlying conceptions of psychosis, schizophrenia and other severe psychological disorders, among various mental health professionals both individually and collectively — some adhering more to verifiable scientific data than others.

It should also be abundantly clear that diagnostic labels set out according to classifications in the Diagnostic and Statistical Manual of the American Psychiatric Association, 3rd Edition, the diagnostic bible or straitjacket, depending on one's view, that binds together all mental diagnostic classification in the United States, are inadequate in general, and as in the example of John Hinckley, grossly inadequate in the particular. The only diagnostic labels that Hinckley appears to have missed out on are enuresis, psychological hangnail and psychosomatic athlete's foot, and we can't even be sure of that.

Hypothetically, how would someone like Adolf Hitler be currently diagnosed by psychiatry, and fare with the insanity defense? Surely, Hitler would have been labeled as complexly as Hinckley: psychotic, schizophrenic; schizotypal personality disorder; suffering from depression and detachment from reality; and so on. Would he then be psychiatrically exculpated because the prosecution would not be able to prove that he was sane and that his behavior was not "the product of mental disease or mental defect"? Yet he carried on the business of government leadership, and maintained control of an entire nation, irrespective of how one might judge it. Can insane persons lead governments? A complex and perplexing question. Clearly, however, psychiatric classification labels seem grossly inadequate for criminal exculpation in such cases.

In sum, the real issues with respect to insanity are psychological questions as to whether: the person is aware or not of what they are doing; or in control or not of what they are doing. The question is whether the person is so confused either by organic factors such as brain cell damage or disease processes or by psychological factors such as psychotic thinking confusion, that they either do not know or cannot control what they are doing. These issues arise only in a relatively small minority of cases of criminality or murder. Evidence showed that these issues did not arise in the case of Hinckley. Hinckley, as "crazy" as his behavior might be considered, seemed both aware and in control of what he was doing (as was likely also the case in the example of Adolf Hitler's violent behavior).

The view of some of the early commentators and journalists at the time of the shooting was that Hinckley had "normal written all over him." Everyone, ranging from mental health professionals to an educated public, ought to know better, if it were not for the inadequate teaching of psychological understanding at many American universities. It should have been clear from the beginning that a John Hinckley is not just the normal, average American boy -- mom and apple pie and all that. As some of the details of his life became known, his distancing from normality became more obvious and his behavior patterns more comprehensible for all to see. Does being an "abnormal" American boy, or suffering from serious psychological problems and fantasies as a "poor little rich boy", however, exculpate Hinckley from individual responsibility for criminal acts or attempted murder? That remains a separate and different question.

To clarify some of the psychological issues involved, equating the presence of severe psychological disturbance with the presence of violence and then offering exculpation by means of the insanity defense, is much too simple a framework.

It is a popular misconception that severely disturbed persons are violent. The fact of the matter is that most people suffering from severe psychological disturbance are not. Scientific data show that less than 1% of all patients released from mental hospitals or clinics are violent, and those with no history of arrests before hospitalization, are less likely than the population in general to engage in violent criminal behaviors after release from hospitalization (National Institute of Mental Health, 1969). Schizophrenic patients, in particular, are less prone to violence than others. Their general behavior, is one of avoiding and withdrawing from interaction and violence.

Psychologically speaking, there are two distinct and separate phenomena to be considered therefore. Mental disturbance is a separate and distinct phenomena from behavior involving the acting out of violence. The two phenomena do not go hand in hand. In coming to grips with the insanity defense, it is necessary to come to the scientific understanding that two separate elements are involved. Some persons because of their developmental history grow up with severe psychological disturbance, others because of their developmental history grow up prone to violence, and some persons because of their developmental history grow up taking some of their behavior from Group A and some from Group B in varying proportions. In sum, a John Hinckley is not simply a psychologically disturbed person. He is a type of person who, because of his developmental history has grown up prone to act out in violence (also true in our other example of Adolf Hitler).

It is important to tie down these psychological issues to verifiable evidence and data. A major research study of a large sampling of criminals, reported at the Eastern Psychological Association meeting, April 1981 (Gochman, Grubler-Gochman & Fantasia), showed no significant linkage between violent criminality and socioeconomic or demographic factors. What it did show however, was a direct and significant linkage between prisoners' earliest recollections of parental influence and the causes of their criminality as perceived by themselves. The profile of the violent criminal murderer was clearly and significantly distinguishable from that of other prisoners by the pattern of their early recollections. The perception of the murderers was one of the world as having done violence to them. This central psychological theme ever-present in their world-view, culminated in a sense of hopelessness in which there was a lack of caring about oneself as demonstrated in suicidal ideation, and a lack of value put upon others, as demonstrated in the criminal history of having murdered.

The above cited study should help to clarify some of the underlying psychological issues involved in the insanity defense.

With respect to the insanity defense therefore, clarity with respect to psychological issues requires the recognition of two separate components: (a) mental disturbance; and (b) the acting out of violent behavior. The presence of one phenomena does not necessarily imply the presence of the other, and different developmental histories are involved for each. The psychological issue hinges on whether the person is aware or not, and in control or not, of what they are doing. Violence to the murderer, in one form or another, often represents acting or striking out against a world perceived as having done violence to them. This violence component found in the murderer, is not often present in the average mentally disturbed person, who in general tends to shun violence.

Clarity from the legal and moral point of view, and the maintenance of a sense of justice and equity, requires that persons be held individually responsible to the moral and legal code. They should not readily be subject to removal from social accountability by "psychiatric exculpation", or by the application of broad, ill-defined terms such as "mental disease" or "mental defect", a rubric under which violent acting out behavior does not fit very well.

Suitable legislation with respect to the insanity defense, based on the above brief, would seem to require the following sequence: (1) determination of individual guilt or innocence in the criminal act; (2) determination of punishment and sentencing for the crime; (3) determination of exculpation by virute of alternate psychological treatment in those exceptional cases where there is sufficient proof that the person did not know what they were doing, or had no control over their violent behavior; (4) determination of an appropriate degree of compassion in sentencing when the person's mental state is in serious question. Legislation that is based on too simple a concept of "guilty but mentally ill", may not meet these requirements very adequately, and may not fare much better over time than the current insanity defense.

Dr. Stanley I. Gochman is Professor of Psychology at Howard University and previously directed its Ph.D. program in Clinical-Community Psychology. He has been Professor of Psychology at the University of Puerto Rico, Clinical Administrator at the National Institute of Mental Health, on the staff of the Peace Corps, Director of the Institute for Analytic Psychotherapy and Bergen Center for Psychological Services, and affiliated with Rutgers University and the Menninger Foundation. A Diplomate in Clinical Psychology, he received his Ph.D. from New York University. He is author of a book, and has written numerous journal articles related to topics in clinical and community psychology, cross-cultural/ethnic psychology, primary prevention and intervention in mental health, and on social policy and world affairs issues. He is Chairman of the Social Issues and Public Policy Committee, Division of Psychoanalysis, American Psychological Association.

○